IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-734

ELIZABETH A. SMITH, et al.,

Petitioners,

vs.

ROBERT TROYAN, et al.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, reversing in part and affirming in part a decision of the United States District Court for the Northern District of Ohio, Eastern Division.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 520 F. 2d 492 (1975), and is set forth in the Appendix, infra, at p. A-59. The order denying rehearing and suggestion for a rehearing en banc is as yet unreported; it is set forth in the Appendix, infra, at p. A-71. The opinion of the United States District Court is reported at 363 F. Supp. 1131 (1973), and is set forth in the Appendix, infra, at p. A-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on July 3, 1975. A motion for a rehearing and a suggestion for rehearing en banc was denied on August 21, 1975. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does a police department's five foot eight inch minimum height requirement create an irrebuttable presumption which is neither necessarily nor universally true in violation of the Due Process Clause of the Fourteenth Amendment?

2. Does "indirect 'rational support' "

suffice to satisfy the requirement of the Equal Protection Clause where sex discrimination in employment is alleged?

3. Does the Fourteenth Amendment permit use of a non-job related written entrance examination having a racially disproportionate impact merely because the employer has recently hired minorities at a rate comparable to their representation in the initial applicant pool?

CONSTITUTIONAL PROVISION INVOLVED

U. S. Const. Amend. XIV. Sec. 1

> . . . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Elizabeth A. Smith, a black female five feet five inches tall and weighing 135 pounds, applied for the position of police officer of the City of East Cleveland Police Department on March 21, 1973. The petitioner's application was summarily rejected on March 23, because she did not meet the City's requirements of being between five feet eight inches and six feet six inches in height and between 150 and

235 pounds in weight. The petitioner filed a complaint in the United States District Court for the Northern District of Ohio on March 23, 1973, alleging that the enforcement of the minimum height and weight requirements unconstitutionally discriminated against her in violation of the Fourteenth Amendment to the United States Constitution. Jurisdiction of the District Court was asserted under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

On March 23, 1973, the District Court issued a temporary restraining order to permit the petitioner to take the physical fitness and written tests for police officer the next day, despite the fact that she did not meet the minimum height and weight requirements. While she passed the physical fitness test, the petitioner did not score sufficiently high on the written examination, the Army General Classification Test (AGCT), to be placed on the certified list of eligible police candidates. The petitioner immediately amended her complaint, adding an allegation that the written examination unconstitutionally discriminated against her in violation of the Fourteenth Amendment.

The petitioner's complaint had been brought on behalf of herself and all others similarly situated. On May 9, 1973, the District Court certified the proceedings as a class action with

two subclasses, including: (1) All women who had been denied the right to apply for the examinations for police officer because of their height or weight; and (2) All black persons who took the examination and were denied employment because their scores were too low.

It was established at trial that no woman had ever been hired as a police officer in East Cleveland, and that at the time of the hearing, the City's Civil Service Commission was not seeking, nor had it ever sought, women applicants for the job of police officer. Indeed, women were discouraged by Civil Service Commission employees from applying for police officer positions. The evidence also revealed that in 1973, sixty percent of the population of East Cleveland was black, while only nine (12%) of the City's seventy-one police officers were black. There are no females on the force.

The Height Requirement

After a hearing, the District Court held that the defendants' enforcement of the minimum height and weight requirements for police officer applicants unlawfully discriminated against the petitioner and the class she represented, in that the requirements were maintained and enforced by the defendants as a part of a process to hire only males and with the effect and intent to exclude nearly all women

from consideration as police officers.

The evidence showed that the effect of the minimum height and weight requirements together was to exclude 99 percent of the adult female population in the community from employment as police officers. The height requirement alone excluded 95 percent of the adult female population, but only 46 percent of the male population.

No rational relationship was established at trial between the minimum height requirement of five feet eight inches and the following qualifications which the defendants alleged were necessary to perform the duties of a police officer: Physical strength, physical fitness, physical agility, the ability to view crowds, the ability to drive a car, long reach with the arms, the ability to absorb blows, and the ability to impress others with physical prowess. Neither the Law Enforcement Assistance Administration (LEAA), nor any other agency or authority which had reviewed the relationship between height requirements and police work had found convincing evidence supporting minimum height requirements.

The Written Examination

The District Court held that the defendants' use of the written examination, the Army

General Classification Test, to screen applicants unlawfully discriminated against blacks, and that the petitioner had established a prima facie case of race discrimination which the defendants had failed to rebut.

The evidence established that the written examination was a major factor in the ranking of applicants for certification as city police officers. The exclusionary impact which the test had upon black applicants was shown to be substantial. From 1969 to 1973, the AGCT eliminated from further consideration 84% of the blacks who took the test, but only 42% of the whites who took the test, thus reducing the applicant pool from 38% black to 15% black. [1]

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[1] Between 1969 and 1973, 301 individuals took the written examination for police officer in East Cleveland. Of this number, 115 or 38% were black. As can be seen from the accompanying chart, the fail rate for blacks is twice that for whites, while the pass rate for whites is almost four times that for blacks.

1969-1973	Number Of Applicants	% Of Total	Number Passing	Number Failing	Fail Rate	Pass Rate	% of Passes
White	186	62%	107	79	42%	57%	85%
Black	115	38%	18	97	84%	15%	15%
Total	301	100%	125	176	58%	41%	100%

Additionally, black applicants on the average scored substantially lower on the written examination than did white applicants. In 1970, the percentage of whites receiving a raw AGCT score of over 100 was 63%, while the percentage of blacks receiving a score of over 100 was 9%. In 1973, these figures were 71% and 22% respectively. The average raw AGCT score for black applicants in 1973 was 83.2, while the average score for white applicants was 106.4. Both petitioner's and defendants' experts agreed that this difference was highly significant and not likely to occur by chance alone.

Defendants were unable to establish that the AGCT was a valid predictor of job performance of a police officer. Indeed, the only validation study reported in the Technical Manual for the AGCT related to the performance of white male enlisted personnel in military vocational schools. There was no evidence that the AGCT was a valid predictor of performance for blacks.

The United States Court of Appeals for the Sixth Circuit reversed in part and affirmed in part the District Court's decision. The Court of Appeals held that the enforcement of the minimum height requirement did not violate the Fourteenth Amendment, but that the use of the weight requirement was unconstitutional. Sufficient "indirect 'rational support' " was found to uphold the height requirement, but not the weight

requirement. The Court of Appeals further held that the written examination was constitutional, stating that the petitioner had failed to establish a prima facie case of race discrimination because the percentage of blacks hired was not substantially lower than the percentage of black applicants. The petitioner seeks to have this Court review the Sixth Circuit Court of Appeal's decision with respect to the constitituionality of the enforcement of the minimum height requirement and the use of the Army General Classification Test by the defendants.

REASONS FOR GRANTING THE WRIT

1. To Clarify The Standard Of Review Applicable To Irrebuttable Presumptions Adversely Affecting The Right To Equal Consideration For Governmental Employment

In applying the requirements of the Fourteenth Amendment to the defendants' minimum height requirement, the Court of Appeals for the Sixth Circuit failed to resolve, or even to consider, the appropriate standard of review where permanent irrebuttable presumptions are alleged. Indeed, the Court took no note whatsoever of petitioner's argument that the height requirement embodied a conclusive presumption that individuals shorter than five feet eight inches or taller than six feet six inches were not capable

of performing the job of police officer, in violation of the Due Process Clause. Thus, it appears that, in the Court's view, the "indirect 'rational support' " which was held sufficient to legitimize the height rule under the Equal Protection Clause, also sufficed for purposes of the Due Process Clause.

While the Due Process Clause does not require those conclusive presumptions that create partial deprivations or are temporary in nature to be struck down, Sosna v. Iowa, ___ U. S. ___, 95 S. Ct. 553 (1975), decisions of this Court in recent years uniformly have invalidated broadly sweeping irrebuttable presumptions which have deprived women of equal employment opportunity.

In Frontiero v. Richardson, 411 U. S. 677 (1973), the conclusive presumption that wives of Air Force officers were dependent upon their husbands for support was upheld only by extending a like presumption to benefit the husbands of female officers. The standard of review applied by this Court was stated in its plurality opinion to be one of strict judicial scrutiny. While explained in that opinion by the suspect nature of the sexual classification there challenged, Frontiero may also reflect the standard generally applicable to the review of conclusive presumptions. For example, just shortly after Frontiero was decided, Justice Burger and Justice Rehnquist, dissenting in Vlandis v. Kline, 412 U.S. 441 (1973),

interpreted the majority opinion in Vlandis as subjecting the presumption of non-residency there in issue to "close judicial scrutiny," 412 U.S. at 460-62, although no racial or other suspect classification was under review.

Similarly in Cleveland Board of Education v. La Fleur, 414 U. S. 632 (1974), where irrebuttable presumptions precluded women from working during certain months both prior to and after childbirth, this Court noted that "a more individualized determination" was required under the Due Process Clause as interpreted in Stanley v. Illinois, 405 U. S. 645 (1972); United States Department of Agriculture v. Murry, 413 U. S. 508, 514-17 (1973) (concurring opinion); Bell v. Burson, 402 U. S. 535 (1971); and Carrington v. Rash, 380 U. S. 89 (1965). 414 U.S. at 647. In ruling that the mandatory maternity rule of the Cleveland and Chesterfield County boards of education swept too broadly, this Court noted:

> The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.
> 414 U. S. at 643.

In the present case, physical competency was also the issue before the Court of Appeals. Both

in Frontiero and in La Fleur administrative convenience alone was deemed insufficient to save what otherwise was a violation of due process of law.

In Vlandis v. Kline, supra, this Court noted that the conclusive presumption there in issue could not stand where "reasonable alternative means for determining bona fide residence are available." 412 U. S. at 451. The Court of Appeals in its opinion below neither recognized a conclusive presumption, nor considered the proper standard of review to which such presumptions are subject. In so doing it also failed to note the trial court's findings of readily available alternative means of determining strength, the principal characteristic which the height requirement was alleged by the defendants to measure.

Petitioner believes that this Court, in clarifying the standard of review applicable to irrebuttable presumptions should also indicate to what extent a lower court must consider alternatives to administrative convenience where conclusive presumptions deny equal employment opportunity to women, alternatives which are routinely considered when similar employer regulations are assessed against the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), et seq.; Albemarle Paper Co. v. Moody, ___ U.S. ___, 95 S. Ct. 2362,

2375 (1975); Palmer v. General Mills, Inc., 513 F. 2d 1040, 1044 (6th Cir. 1975); Robinson v. Lorillard, 444 F. 2d 791, 798 (4th Cir. 1971); Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States, 416 F. 2d 980, 990 (5th Cir. 1969).

2. To Resolve Conflicts Within And Among The Circuits Concerning The Standard Of Review Under The Equal Protection Clause Applicable To Fair Employment Practice Litigation

The Court of Appeals for the Sixth Circuit appears to have considered the success of petitioner's equal protection claim to be dependent on the classification under scrutiny being one that was gender-based. Petitioner contends that while the determination of whether a classification is gender-related may be important in selecting the standard of equal protection used to test its constitutionality, the protections of the Fourteenth Amendment are not restricted to the review of classifications which are explicitly sexually or racially based.

Assuming, arguendo, that "the height requirement is viewed as gender discrimination," the Court of Appeals below stated that "it must be sustained if it 'bears a rational relationship to a [legitimate] state objective' ", citing to

Reed v. Reed, 404 U. S. 251, 254 (1971). While recognizing that lower federal courts since Reed have applied a variety of tests of equal protection to gender-based classifications, the Court of Appeals noted that "never has this Court or a Supreme Court majority required a compelling state interest to justify such classifications."

Petitioner questions both whether the "rational relationship" test is the appropriate standard of equal protection to be used in an employment discrimination case and, if it is, whether the Court of Appeals correctly applied this test.

a. The Proper Standard Of Review

Until recently numerous courts, including the Court of Appeals for the Sixth Circuit, have assumed that similar or identical standards apply in fair employment practice cases brought pursuant to provisions of the Nineteenth Century Civil Rights Acts, 42 U.S.C. §§ 1981, 1983, 1985, and to those of Title VII of the Civil Rights Act of 1964, supra.

In Long v. Ford Motor Company, 496 F. 2d 500, 505 (6th Cir. 1974), the Sixth Circuit first specifically noted the applicability of Griggs v. Duke Power Co., 401 U. S. 424 (1971), a Title VII testing case, to a case filed solely under § 1981. In Griggs, a neutral rule having a disparate effect upon racial minorities was held to be invalid in the absence of a showing of

business necessity. Similarly, in Long v. Sapp, 502 F. 2d 34 (5th Cir. 1974), standards pertaining to Title VII's bona fide occupational qualification exemption were applied to a sex discrimination suit brought only under §§ 1981, 1983 and 1985. Earlier, in United States v. Chesterfield County School District, S. C., 484 F. 2d 70 (4th Cir. 1973), in a Fourteenth Amendment case alleging race discrimination in employment, the Court stated:

> . . . it has been held, and we think correctly, that the test of validity under Title VII is not different from the test of validity under the fourteenth amendment. 484 F. 2d at 73.

Other courts of appeals decisions which have applied standards similar to those of Title VII to litigation under the Nineteenth Century Civil Rights Acts include Afro American Patrolmens League v. Duck, 503 F. 2d 294, 301 (6th Cir. 1974); Davis v. Washington, 512 F. 2d 956, 957-58, n. 2 (D.C. Cir. 1975), cert. granted Oct. 6, 1975, 44 U.S.L.W. 3179 (Oct. 7, 1975) (No. 74-1492); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 482 F. 2d 1333, 1337 (2nd Cir. 1973); Commonwealth of Pennsylvania v. O'Neill, 473 F. 2d 1029 (3rd Cir. en banc 1973); Castro v. Beecher, 459 F. 2d 725, 732-33 (1st Cir. 1972);

Chance v. Board of Examiners, 458 F. 2d 1167, 1176 (2nd Cir. 1972); Carter v. Gallagher, 452 F. 2d 315, 325-29 (8th Cir. en banc 1971), cert. denied 406 U. S. 950 (1972).

Although Title VII and constitutional standards in recent years have been used interchangeably in fair employment practice litigation, in the wake of Geduldig v. Aiello, 417 U. S. 484 (1974), numerous courts have begun questioning whether Fourteenth Amendment standards are as strict as those of Title VII when applied to cases concerning sex discrimination in employment. Satty v. Nashville Gas Co., ___ F. 2d ___, 11 FEP Cases 1, 4 (6th Cir. 1975); Communications Workers v. A.T. & T. Co., 513 F. 2d 1024, 1031 (2nd Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3684 (June 24, 1975) (No. 74-1601); Gilbert v. General Electric Co., 519 F. 2d 661, 667 (4th Cir. 1975), cert. granted, 44 U.S.L.W. 3179 (Oct. 7, 1975) (No. 74-1589 and 74-1590); Hutchison v. Lake Oswego School District, 519 F. 2d 961, 66 (9th Cir. 1975). While all of these cases were decided under Title VII of the Civil Rights Act of 1964, in each of them the appellate court commented on the greater protection provided by Title VII when compared with that of the Equal Protection Clause.

This Court has recognized the variety of standards which have been used in recent years to interpret the mandate of the Equal Protection

Clause. Stanton v. Stanton, ___ U. S. ___, 95 S. Ct. 1373, 1377 (1975); Vlandis v. Kline, supra, 412 U. S. at 458 (White, J., concurring); San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 98-9 (1973) (Marshall, J., dissenting).

Petitioner submits that direction from this Court is urgently needed to determine whether denials of equal employment opportunity under the Fourteenth Amendment are to be gauged by the lighter standard of review embodied in Dandridge v. Williams, 397 U. S. 471, 484-85 (1970), which was recognized by this Court in Aiello, supra, as particularly suited to review of economic and social welfare legislation, or whether the more active review first heralded by Reed v. Reed, supra, will continue to be applied. Petitioner also urges this Court to clarify whether one standard of review should be used in all fair employment practice litigation based upon the importance of the interest to be protected, or whether the Equal Protection Clause henceforth will condone a weaker standard of review for those allegations of employment discrimination based on sex.

b. Does "Indirect 'Rational Support' " Suffice?

Even if the appropriate test of equal protection in an employment discrimination case is the "rational relationship test," petitioner con-

tends that the Court of Appeals has failed to apply the standard of Reed v. Reed, supra, selecting instead a weaker "indirect 'rational support'" test. In footnote 8 of its opinion, the Court noted that while it had been unable to find "indirect 'rational support' " for the defendants' weight requirement, it had found such support for the height requirement.

That the Court of Appeals found no more than "indirect 'rational support' " for the height requirement appears clear from a reading of the opinions of the district and appellate courts. The district court judge had received fifteen days of evidence on the height and weight requirements, including testimony and depositions from seven expert witnesses. The Court of Appeals reversed the District Court without explicitly rejecting its findings, stating:

> Even if plaintiff's experts were correct, and even if modern police practices discount the importance of height, there would still be 'rational support' for the height requirement. The Equal Protection Clause requires nothing greater than 'rational support'

citing to Dandridge v. Williams, 397 U. S. 471, 484-85 (1970).

The Court of Appeals did not consider it necessary to review the lower court's detailed findings of fact, nor to pay any deference to the Law Enforcement Assistance Administration's Equal Rights Guidelines, "Effect on Minorities and Women of Minimum Height Requirement for Employment of Law Enforcement Officers", 38 Fed. Reg. 6415 (1973). Instead, the court held that governmental views disfavoring height requirements "cannot rebut the nearly universal use of height requirements in hiring police." Substituting its judgment of the evidence for that of the District Court, the Court of Appeals chose to rely on the evidence of three police officers since, in its view, "no expert had police experience", failing to take into account that one expert was an industrial psychologist employed by the International Association of Chiefs of Police, Inc.

Petitioner submits that while the Court of Appeals may have applied a test of equal protection compatible with the requirements of Dandridge, supra, no employment discrimination case decided by this Court since Goesaert v. Cleary, 335 U. S. 464 (1948), has employed so weak a standard. In Goesaert, where this Court upheld a Michigan statute that prohibited most women from tending bar, the Court pointed out that it could not "cross-examine either actually or argumentatively the mind of Michigan Legislators nor question their motives." 335 U. S.

at 466-67. As noted recently by the Court of Appeals for the Seventh Circuit:

> While the Supreme Court has not yet overruled Goesaert v. Cleary, the judicial and social climate has changed since that case was decided. White v. Fleming, ____ F. 2d ____, 11 FEP Cases 621 (7th Cir. 1975).

Goesaert was the principal case upon which this Court had relied in Dandridge v. Williams. When some courts of appeals apply the standard of Dandridge to employment discrimination litigation, thereby letting Goesaert in the back door, petitioner submits that the time for this Court to reconsider the vitality of Goesaert is due.

c. Remedying The Effects Of Past Discrimination

Otherwise neutral practices having a disparate impact are routinely enjoined under the Equal Protection Clause when they have been shown to perpetuate the effects of past discrimination. The Court of Appeals of the Sixth Circuit, in finding "indirect 'rational support'" for the defendants' minimum height requirement failed to consider whether the District Judge's ruling that the height requirement would be enjoined was a proper remedy to correct the

effects of past discrimination against women.

While this Court has not yet interpreted when the effects of past discrimination must be remedied within the context of employment discrimination law under the Fourteenth Amendment, it has carefully analyzed the requirements of this doctrine as it applies to school desegregation litigation. In Keyes v. School District No. 1, Denver, Colorado, 414 U. S. 883 (1973), a finding of intentional past discrimination was held to establish a prima facie violation of the mandate of the Equal Protection Clause, thereby shifting the burden of proof onto the defendant school district. This Court further stated:

> In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions. 413 U. S. at 211.

The District Court in the present case made findings that the defendants had "never certified for hiring or hired a woman as a police officer," although fifty-five percent of the City's population was female. The Court also held that:

> The height and accompanying weight requirement were maintained and enforced by defendants as a part of a process to hire only males as police officers and with the effect and intent to exclude nearly all women applicants.

On the basis of the evidence the District Judge concluded that the defendants' past sex discrimination required imposition of "limited affirmative relief"--namely enjoining further enforcement of the minimum height and weight requirements.

The Court of Appeals for the Sixth Circuit has frequently applied the instruction of Keyes to school desegregation cases. Brinkman v. Gilligan, 518 F. 2d 853 (6th Cir. 1975); Oliver v. Michigan State Board of Education, 508 F. 2d 178 (6th Cir. 1974); Higgins v. Board of Education of City of Grand Rapids, 508 F. 2d 779 (6th Cir. 1974); and Bradley v. Milliken, 484 F. 2d 3112 (6th Cir. 1974), rev'd in part on other grounds 418 U. S. 717 (1974). It has also recognized as violative of Equal Protection guarantees those practices that perpetuate the effects of past racial discrimination in employment. Shack v. Southworth, 521 F. 2d 51 (6th Cir. 1975); Afro American Patrolmen's League v. Duck, supra. However, the Court of Appeals has

failed to act in similar fashion where, as here, the nature of the discrimination challenged is sex discrimination. Petitioner submits that clear direction from this Court is, therefore, needed.

3. To Resolve Conflicts Among The Circuits Concerning When A Non-Job Related Test Having A Racially Disparate Impact May Nevertheless Be Used

While the Court of Appeals for the Sixth Circuit appears to have admitted that the Army General Classification Test administered to the petitioner had a racially disproportionate impact, it nevertheless held that the petitioner had failed to establish a prima facie case of racial discrimination in employment. The Court apparently reached this conclusion because the defendants had recently hired minorities at a rate comparable to their representation in the initial applicant pool.

By refusing to hold that a disproportionate minority pass or fail rate suffices to establish a prima facie case of discrimination under the Fourteenth Amendment, the Court of Appeals below has diverged sharply from the views of at least seven other courts of appeals. Davis v. Washington, supra; Boston Chapter of NAACP, Inc. v. Beecher, 504 F. 2d 1017 (1st Cir 1974); Vulcan Society of N. Y. City Fire Dept., Inc. v. Civil Service Commission, 490 F. 2d 387

(2nd Cir. 1973); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, supra; Commonwealth of Pennsylvania v. O'Neill, supra; Walston v. County School Board of Nansemond County, Va., 492 F. 2d 919 (4th Cir. 1974); Baker v. Columbus Municipal Separate School District, 462 F. 2d 1112 (5th Cir. 1972); Carter v. Gallagher, supra.

In Davis v. Washington, supra, after careful analysis of all of the public employment testing cases, the Court of Appeals for the District of Columbua held that a prima facie case of discrimination could be established in either of two ways: by a comparison of the failure rates of blacks and whites, or, should such statistics not be available, by comparing the percentage of blacks in the police department with the percentage of the black population in the community. 512 F. 2d at 960. In the present case, blacks failed the written test at a rate double that of whites. See note 1, supra, at 7. Of the seven courts of appeals that have ruled on the issue, only in Davis was the failure rate of blacks on the written examination greater than in the present case. The District Court also found that while blacks constituted sixty percent of the population of the City of East Cleveland, only about twelve percent of its police force was black.

Thus, under either of the tests described in Davis, petitioner established a prima facie case

of discrimination requiring the defendants to demonstrate that the written entrance examination was job-related. The language of the Court's decision in Davis would not absolve the defendants from the requirement of using fair and non-discriminatory job screening procedures, despite its immediate past hiring record. As was stated in Davis:

> Thus, it has been expressly held, and we agree, that efforts to recruit minority members have no bearing on a showing that an employment practice has a racially disproportionate impact. Although the Department, quite commendably, has succeeded in increasing the proportion of black officers through vigorous efforts, it is self-evident that use of selection procedures that do not have a disparate effect on blacks would have resulted in an even greater percentage of black police officers than exists today.
> 512 F. 2d at 961 (footnotes omitted)

In support of this statement, the Court of Appeals for the District of Columbia cited various precedents, including the District Court's decision in the present case. The Sixth Circuit Court of Appeals has thus brought itself into direct conflict with the appellate decision in Davis on this point.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

A-1

Memorandum Opinion and Order
of District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed Sep. 6, 1973)

ELIZABETH A. SMITH, et al., Plaintiffs

v.

CITY OF EAST CLEVELAND et al., Defendants

LAMBROS, DISTRICT JUDGE

Plaintiffs claim that practices and restrictions of defendant municipal officials in hiring police officers in East Cleveland, Ohio, deny blacks and women their rights to equal protection under the law in violation of 42 U. S. C. §1983 and the Fourteenth Amendment to the Constitution.

Plaintiff represents both a class of all women who have been denied the opportunity to apply for employment as an East Cleveland police officer because they are under 5 feet 8 inches or 150 pounds and a class of all black applicants who took the East Cleveland examination for police officer and were denied

employment because their scores were too low. In particular, plaintiffs claimed at trial the following violations of the Equal Protection Clause of the Fourteenth Amendment:

1. Defendants' enforcement of an ordinance requiring applicants for police officer to be a minimum of 5 feet 8 inches in height and a regulation requiring applicants to weigh a minimum of 150 pounds unlawfully discriminates against female applicants.

2. The written Army General Classification Test which is administered by defendants as a part of the hiring process for police officer unlawfully discriminates against black and female applicants.

3. The preference given to applicants who are veterans is applied by defendants prior to determining whether a candidate is qualified to be a police officer in violation of Ohio Rev. Code §143.16. This method of applying the preference results in unlawful discrimination against female applicants.

For each of these claims plaintiffs seek declaratory and injunctive relief, costs, and attorney fees.

I. BACKGROUND OF THIS DISPUTE

The Police Department in the City of East Cleveland, a suburb of Cleveland, has an authorized strength of 71 officers, of whom 51 are patrolmen, 11 are detectives, and the

remainder are administrative personnel. The City population of 39,600 is presently about 60 per cent black and 55 per cent female. Nine persons or about 12 per cent of the officers are now black. There are no female police officers.

Historically, the composition of the Police Department and population has remained fairly constant with respect to sex but has varied somewhat with respect to race. The proportion of women in the population has historically been about 55 per cent, but the City has never certified for hiring or hired a women [sic] as a police officer. The proportion of blacks in the City increased from 10 per cent in 1965 to the present 60 per cent. Prior to 1967 the Police Department had no black officers. From 1967 to the filing of this suit the City hired 24 officers, of whom 8 persons or one third were black. During this time, about one third to one half of the applicants were black.[1/]

1/ There is no way to ascertain how many women would have applied but for the height and weight requirements written on the flyer accompanying the application forms. One woman did meet the height and weight requirements and took the examination. She did not score high enough on the written examination to be certified.

Defendants, pursuant to ordinances, regulations and policies, accept applications only from those persons who are over 5 feet 8 inches and 150 pounds. The qualifying process for those whose applications are accepted generally includes a written examination (the Army General Classification Test), an athletic test, a medical examination, and an oral interview. These items are scored as will be further discussed below and are adjusted by a credit if the applicant is a veteran. The Civil Service Commission then certifies those applicants receiving the highest scores to the City Manager, who must hire one of the top three certified for each position.

The named plaintiff, a black woman who is 5 feet 5 inches and weighs 136 pounds, received notice that East Cleveland would be accepting applications for police officer from her classmate in law enforcement at Cuyahoga Community College. When she inquired about the position of police officer she was originally discouraged by a receptionist of the Civil Service Commission. After applying she was told by the receptionist that she could not take the examination because she did not meet the minimum height and weight requirements. She then filed this suit and took the examination pursuant to a temporary restraining order issued by Judge William K. Thomas. Upon completion of the examination defendants reported that plaintiff had scored 102.1 and that because the "cut-off" score

for the eligibility list was 146, plaintiff was not placed on the certified list of eligible police candidates. Defendants maintain that plaintiff may be prohibited from taking subsequent examinations because she does not meet the height and weight requirements.

II. DEFENDANTS' MOTION TO DISMISS

Defendants have moved to dismiss certain named defendants on the grounds of legislative immurity, failure to state a claim against certain defendants and inapplicability of the term "person" as used in §1983 to the City. In addition, defendants have moved to dismiss the entire suit on the grounds that the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e, is the exclusive remedy for employment discrimination and that this suit is barred for a failure to exhaust remedies available before the Equal Employment Opportunity Commission, as is required under that statute. The Court deferred ruling on these motions until after trial.[2/]

Defendants correctly argue that this Court has no jurisdiction over defendant City of East Cleveland under 42 U.S.C. §1983 and 28 U.S.C.

2/ Defendants also moved to dismiss plaintiffs' claims against the Law Enforcement Assistance Administration. In a pre-trial ruling the Court severed these claims for purposes of trial and deferred ruling on them.

§1343(3) under the holding in City of Kenosha v. Bruno, __U. S. __, 37 L. Ed. 2d 109 (1973), that a municipal corporation is not a "person" for purposes of §1983. The Court in City of Kenosha, however, reserved the question of jurisdiction under the general federal question statute, 28 U. S. C. §1331, over claims brought under the Fourteenth Amendment. City of Kenosha, supra, 37 L. Ed.2d at 117. In Bivens v. Six Unknown Federal Narcotics Agents, 403 U. S. 388 (1971), the Supreme Court permitted a litigant to raise a Fourth Amendment claim in federal court under 28 U. S. C. §1331 but did not discuss whether a Fourteenth Amendment claim would also pose a federal question. Because there has been insufficient argument on this point, the Court is hesitant to rule that a litigant may obtain relief for a violation of the Fourteenth Amendment by a state or subdivision thereof which denies "to any person within its jurisdiction the equal protection of the laws" under the jurisdiction conferred by 28 U. S. C. §1331 alone. See generally Bivens, supra, 403 U. S. at 398 (J. Harlan's concurring opinion). Furthermore, in this case the plaintiffs have not provided evidence sufficient to determine whether the amount in controversy as to each member of the class meets the $10,000 jurisdictional minimum required under §1331. Snyder v. Harris, 394 U. S. 332 (1969) (regarding jurisdiction under 28 U. S. C. §1332); Russo v. Kirby, 453 F. 2d 548, 551 (2d Cir. 1971)

(applying to jurisdiction under 28 U. S. C. §1332). Therefore, the Court will dismiss the claims against the City of East Cleveland without prejudice to their reinstatement if plaintiffs show a basis for jurisdiction within twenty days of the date of this Order.

Because plaintiffs have failed to show any non-legislative function performed by the City Commissioners or any acts by the City Manager which have denied plaintiffs equal protection of the laws, the Court must also dismiss these parties defendant from the suit. It does, however, find that the Police Chief's functions in defining the duties and required skills for the police officer and the Civil Service Commissions' acts in promulgating requirements for certifying applicants are properly before this Court and that the Police Chief and Civil Service Commission should not be dismissed.

Finally, the Court finds defendants' argument that the Civil Rights Act of 1964 as amended in 1972 is the sole remedy for employment discrimination to be without merit. The following cases, many of which were against public employers and were brought after the 1972 amendment to the Civil Rights Act of 1964, reject the argument that the provisions of 42 U. S. C. §2000e provide an exclusive remedy for employment discrimination, particularly in a case such as this in which a preliminary injunction is required immediately to prevent irreparable damage. Castro v. Beecher, 459 F. 2d 725 (1st Cir. 1972); The Shield Club v. City

of Cleveland, 5 [CCH] EPD ¶7027 (N. D. Ohio 1972) (J. Thomas); Harper v. Mayor & City Council, 5 FEP Cases 1050 (D. Md. 1973); Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 354 F. Supp. 778 (D. Conn. 1973), aff'd 42 L.W. 2059 (2d Cir. 1973); Waters v. Wisconsin Steel Works of International Harvester Co., 427 F. 2d 476 (7th Cir. 1970), cert. denied, 400 U. S. 911 (1970); Sanders v. Dobbs Houses, Inc., 431 F. 2d 1097 (3d Cir. 1970), cert. denied, 401 U. S. 948 (1971); Cantwell v. National Brewing Co., 443 F. 2d 1044 (5th Cir. 1971), cert denied. 405 U. S. 916 (1972); O'Brien v. Shimp, 356 F. Supp. 1259, 1263-1265 (N. D. Ill. 1973).

III. HEIGHT AND WEIGHT REQUIREMENTS

Applicants for police officer in East Cleveland must be between 5 feet 8 inches and 6 feet 6 inches in height and must be between 150 and 235 pounds in weight. The height requirement is imposed by ordinance which provides:

> To be eligible for appointment as patrolman or fireman, the applicant must be at least five feet, eight inches in height, but not over six feet, six inches. Ch. 123. 07(d), Codified Ordinances of the City of East Cleveland.

The ordinance was passed in 1964. However, prior thereto a height requirement was imposed by practice of the Civil Service Commission.

The weight requirement has been established by the City pursuant to the medical fitness requirement in Ch. 123. 07(c) of the Codified Ordinances of the City of East Cleveland and is stated in the flyer given to potential applicants. The minimums and maximums are established for each height between 5 feet 8 inches and 6 feet 6 inches. The minimum for the entire group is 150 pounds and the maximum 235 pounds.[3/]

A. Discriminatory Intent and Effect of Requirements.

The effect of the height and weight requirements together is to exclude 99 per cent of the

3/ The approved weights in pounds are as follows:

5'8"	150-181
5'9"	150-186
5'10"	152-192
5'11"	154-197
6'	156-203
6'1"	158-209
6'2"	160-214
6'3"	162-219
6'4"	164-225
6'5"	166-230
6'6"	168-235

adult female population in the community from employment as police officers. Separately, the height requirement excludes 95 per cent of the adult female population and the weight requirement excludes between 78 and 84 per cent of the adult female population. In contrast to this almost total exclusion of women, the requirements permit the majority of the adult male population to be eligible for such employment. The height requirement excludes only 46 per cent of the adult male population and the weight requirement excludes only 28 per cent of the adult male population.[4/]

The height and weight requirements must be examined in the context of the prevailing policy toward hiring women. Jay Price, president of the East Cleveland Civil Service Commission from 1951 to 1971, stated that there were no positions open for women in the 1950's when the height and weight requirements were maintained as Civil Service practices. He further explained that the requirements represented a figure which was considered reasonable for male applicants and that, had the Commission been seeking women, it would

4/ The exact percentages vary slightly depending on the age group chosen. However, the differential between males and females remains fairly constant.

have modified the requirements accordingly. The fact that the Civil Service Commission did not want to hire women is verified by the testimony of plaintiff and another woman applicant that the receptionist answering the phone at the Civil Service Commission attempted to discourage their applications, stating that the Police Department was not seeking women. It is also significant that two males under 5 feet 8 inches were permitted to take the 1973 examination. During the entire history of the Police Department no women have either been certified for hiring or hired as police officers and only one has been voluntarily permitted to take the examination. All these factors are relevant in determining whether the height and weight requirements discriminate on the basis of sex. See generally Harper v. Mayor & City Council, 5 [CCH] EPD ¶1050 (D. Md. 1973).

The background that the requirements related to a male-only policy and their exclusionary effect, considered together, lead the Court to the conclusion that the height and weight requirements are discriminatory on the basis of sex. Moreover, the effect of the requirement on men and women is so highly disparate that the effect alone is sufficient to require a review of the restrictions as classifications based upon sex.

The practice of permitting consequences of restrictions and not merely motivation to be used as proof of discrimination was sanctioned

under the Civil Rights Act of 1964, 42 U. S. C. §2000e, in Griggs v. Duke Power Co., 401 U. S. 424 (1971). Three circuits have also ruled under the Civil Rights Acts of 1866 and 1871, 42 U. S. C. §§1981 and 1983, that a requirement producing a largely disparate effect on a given group would be constitutionally impermissible if the requirement were not rationally related to job performance. Chance v. Board of Examiners, 458 F. 2d 1167 (2d Cir. 1972); Castro v. Beecher, 459 F. 2d 725 (1st Cir. 1972); Carter v. Gallagher, 452 F. 2d 315 (8th Cir. 1971) (en banc), cert. denied 406 U. S. 950 (1972); Commonwealth of Pennsylvania v. O'Neill, 348 F. Supp. 1084 (E. D. Pa. 1973), aff'd in part, rev'd in part 473 F. 2d 1029 (3d Cir. 1973) (en banc); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 354 F. Supp. 778 (D. Conn. 1973) aff'd 42 L. W. 2059 (2d Cir. 1973); Shield Club v. City of Cleveland, 5 [CCH] EPD ¶7027 (N. D. Ohio 1972); Western Addition Community Organization v. Alioto, 330 F Supp. 536 (N. D. Cal. 1971), 340 F. Supp. 1351 (N. D. Cal. 1972); Fowler v. Schwarzwalder, 348 F. Supp. 844 (D. Minn. 1972), 351 F. Supp. 721 (1972). In none of these cases was the disparate effect of the hiring requirement involved as great as that of the height and weight requirement in this

case.[5/] Although the Court is aware that the cases cited related to discrimination based on race or national origin, it believes the method of proving discrimination is equally applicable to women.

Based on the evidence of intent and effect or, alternatively, effect alone, the Court concludes that the height and weight requirements in this case discriminate on the basis of sex. The question of whether this discrimination is lawful depends on whether the height and weight requirements are rationally related to a valid state interest. Frontiero v. Richardson, ___ U. S. ___, 41 L. W. 4609 (1973). In this case,

5/ In Bridgeport Guardians, Inc., supra, 58 per cent of the whites taking the examination received a passing score while only 17 per cent of the minority groups received a passing score. In The Shield Club, supra, 95.5 per cent of the whites taking the examination received a passing score while only 73.7 per cent of the blacks received a passing score. In Castro, supra, 65 per cent of the whites taking the examination used received a passing score while only 25 per cent of the blacks and 10 per cent of the Spanish surnamed persons received a passing score. In Chance, supra, white candidates passed supervisory examinations at almost 1 1/2 times the rate of black and Puerto Rican Candidates. In Carter, supra, blacks constituted

the question is whether the height and weight requirements are rationally related to job performance for an East Cleveland Police Officer.

B. Justifications for Requirements --Legal Theory

The Supreme Court's holdings regarding review of classifications based on sex in Reed v. Reed, 401 U.S. 71 (1971), and Frontiero v. Richardson, ___U.S.___, 41 L.W. 4609 (1973), represent a significant departure from the review given similar classifications in earlier years.

In its earlier holdings, the Supreme Court upheld restrictions against women under the Equal Protection Clause if there was any conceivable justification for the classification which was related to a valid state interest. In reviewing the justifications given, the Court did not require that the state provide any facts to support their

5/cont'd 6.4 per cent of the population but less than 1 per cent of the fire department. In O'Neill, supra, 65 per cent of the whites taking the examination received a passing score while only 35 per cent of the blacks received a passing score. In Alioto, supra, 37 per cent of the whites taking the examination received a passing score while only 12 per cent of the blacks received a passing score. In Fowler, supra, minorities constituted 6 per cent of the population but only 1 per cent of the fire department.

view but expressed a willingness to accept any generalization based upon a stereotype of women. See generally Brown, Emerson, Falk, Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L.J. 872, 875-882 (1971). For example, in Bradwell v. Illinois, 83 U.S. 130 (1872), the Supreme Court upheld legislation prohibiting women from admission to the bar. Justice Bradley reasoned that such a restriction was justified because "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." 83 U.S. at 141 (J. Bradley, concurring). In 1948 the Supreme Court upheld a statute prohibiting women from being licensed as bartenders unless they were a wife or daughter of a male owner, asserting:

> The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards. Goesaert v. Clearly, [sic] 335 U.S. 464, 465-466 (1948).

As late as 1961 the Supreme Court upheld a statute prohibiting women from jury duty unless the women volunteered, rationalizing that a woman's place was in the home. Hoyt v. Florida, 368 U.S. 57 (1961).

The Supreme Court's earlier holdings demonstrates the result of accepting the

state's rationalizations without further review of the basis for them. In Frontiero, Justice Brennan, speaking for four members of the Court, mentioned these earlier holdings and noted:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes. 41 L.W. at 4611-4612.

In both Reed and Frontiero, the Court refused to accept the "gross, stereotype generalizations" which would have been sufficient to uphold the restrictions under earlier Supreme Court rulings. In Reed, the Court ruled invalid a statute which gave men preference for appointment as administrators of estates and rejected the justification that men would be more often qualified because of their involvement in politics, the professions, business or industry. Reed, 401 U. S. at 77. In Frontiero, the Court held invalid a statute which permitted a presumption of dependency in the case of a serviceman's family but not in the case of a

servicewomen's family, and eight justices rejected the justification that the man is more often the breadwinner as sufficient reason to disqualify all women automatically.[6/] The lower courts reviewing restrictions against women have interpreted the recent cases as representing, first, a willingness to review those stereotype rationalizations for classifications to determine whether they rest on some ground which has a demonstrably fair and substantial relation to the object of the legislation and, second, a willingness to reject administrative cost as a proper justification

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6/ Four justices stated that classifications based upon sex were subject to the close scrutiny test previously reserved for race and national origin. It is unclear whether a fifth member of the Court, Justice Stewart, joined in this position, thereby making it a majority position. Because the Court finds the height and weight requirements are invalid under the rational relationship test applied by Justice Powell in his concurring opinion, it does not reach the question of whether the close scrutiny standard applies to classifications based upon sex.

for permitting restrictions against women in employment. Aiello v. Hansen, ___F. Supp.__ (N.D. Cal. May 31, 1973); Gunther, "Forward: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1, 20, 27-33 (1972); La Fleur v. Cleveland Board of Education, 465 F.2d 1184 (6th Cir. 1972), cert filed 41 L.W. 3315 (1972);[7/] Brenden v. Independent School District 724, 477 F.2d 1292, 1296 (8th Cir. 1973).

Applying the Frontiero standard of review to this case, the Court rejects as an adequate justification the unsupported generalization that large male policemen will perform better than short or female policemen. The Court holds that to sustain requirements which exclude nearly all women from employment as

7/ The Court is unable to reconcile the La Fleur ruling (that requiring pregnant teachers to take a 5 month pre-delivery and 3 month post-delivery leave was unconstitutionally discriminatory) with the ruling in Robinson v. Board of Regents of Eastern Kentucky University, ___F.2d___(6th Cir. 1973) (that women could be forced to observe certain curfews while men would not be under a similar restriction) on the basis of the opinions. It is not apparent whether the trial court in Robinson received evidence on the safety justification prior to upholding the regulation. If it did not receive such evidence, then the Court concludes that the decision in Robinson has been overruled by implication in Frontiero.

police officers, the 5 feet 8 inch and 150 pound minimums must be demonstrably related to job performance.

C. Justifications for Requirements --Facts of this Case

In order to decide whether the height and weight requirements are related to job performance for the officer, the Court must examine the functions of the officers and the skills required to perform those functions. In making the determination, the Court received fifteen days of evidence for the entire case, including testimony and depositions from seven expert witnesses on the height and weight requirements alone. The Court considered the functions performed by all officers, since due to a small department the patrolmen are rotated between various duties and since it is reasonable to hire patrolmen capable of promotion to administrative and other roles in the Department.

In order to aid the Civil Service Commission in testing and certifying applicants for police officer, the Police Department provided the following list of duties of the officer:

> Summary of Duties: Under supervision of Police Department officers, performs general duty police work in the pro-

tection of life and property. Enforces laws and ordinances, does work in the area of crime prevention and crime repression. Is involved in regulation of non-criminal conduct, provides certain services to the community and protects individual freedom of citizens.

At trial, defendants introduced evidence that the following relevant functions were also in some instances performed by officers: effecting arrests, stopping fights, controlling crowds, carrying persons on stretchers from burning buildings, and pulling accident victims from automobiles.

Plaintiffs conceded that these functions were police functions. They presented evidence, however, that those functions claimed to be related to height and weight actually took only a small portion of the average patrolman's time and that, in fact, traffic-related matters accounted for more than three-quarters of the patrolman's working time. On the other hand, since defendants claim that the felony-related functions often resulted in physical injury to officers, the Court must examine them to determine whether they are significant functions for the police officer.

With respect to these functions, certain skills are necessary or desirable. For purposes of the Civil Service Commission, the

relevant skills were described by the Police Department as follows:

> Required Knowledge and Skills:
> Must be above average in social and general intelligence; ability to understand and carry out complex oral and written instructions; knowledge of first aid methods; reliable judgment; ability to drive automobile; some skill in the use of firearms; good powers of observation and memory; excellent moral character; physical strength and agility; excellent physical condition.

At trial, defendants contended that the following relevant qualifications were required in order to perform the duties: physical strength, physical fitness, physical agility, ability to view crowds, ability to drive a car, long reach with the arms, ability to absorb blows, and ability to impress others with physical prowess.

The complex factual problem is to define these broadly labeled skills in relation to the functions performed by the police officer and then to determine whether these narrowly defined skills are related to a requirement that officers be at least 5 feet 8 inches and 150 pounds. In order to make this determination, the Court will separately examine each of the specific skills listed above as they relate to functions performed by East Cleveland police officers.

1. Physical Strength:

Since strength is the ability to produce a desired effect, it is impossible to determine whether the needed strength exists until the desired effect is defined. In the case of a police officer in East Cleveland, the desired effects include restraint of a hostile and struggling person during an arrest or flight, harm to that person in certain instances when restraint is ineffective, carrying persons on stretchers, and pulling persons from wrecked automobiles. Professor Lawrence Golding, an expert in applied physiology who has worked with police departments, testified that these tasks would in most instances require what he referred to as "leverage strength," or the ability to use the body mass at a particular angle in order to lift or to direct the body. In a few instances, the officer who was restraining or fighting could conceivable use what might be characterized as "brute force" or the strength which results from mass alone, such as sitting on a person or hurling his body at someone. These forms of strength will be discussed in more detail below.

The "leverage strengths" such as lifting an accident victim, carrying a stretcher, or twisting an arm to restrain a victim have very little relationship to height and weight but are more directly related to training on the ways to use the body and to fitness and

conditioning the muscles. Where a relationship does exist between height and "leverage strengths," it is a negative relationship. In other words, all things being equal, a very tall person would have a disadvantage because the leverage angle would be less efficient in such activities as lifting. To illustrate this, Professor Golding pointed out that Olympic weight lifters tend to be an average of 5 feet 4 inches.

On the other hand, "brute force" would be directly related to the weight of the person, so that a 200-pound person would exert more force by throwing his or her body against another than could a 100-pound person. To the extent that a larger person could usually weigh more than a shorter person and still remain physically fit, there is some relationship between the ability to exert "brute force" and the height of the individual.

However, since the use of "brute force" in restraining or defending would be more likely to result in injury to the officer and the person restrained than the methods of arm twisting, finger twisting, and applying pressure, the officers are trained and advised to use the "leverage" methods as preferred mothods. Thus, in a modern police force, the ability to use "brute force" is not a necessary skill to perform job functions.

In summary, therefore, there is no positive relationship between "leverage strength"

needed to perform police tasks and an individual's height and weight. Furthermore, there is a tenuous positive relationship between "brute force" and height and a positive relationship between "brute force" and weight, but there is very little need for the use of such force by a modern police officer.

2. Physical Fitness

Physical fitness includes both stamina (cardiovascular efficiency) and the proper balance of body muscle and body fat. There is no doubt that some level of physical fitness is related to job performance. Physical fitness is unrelated to height. Therefore, the question is whether it is related to the minimum weight requirement, which is set forth in Footnote 3 above.

Professor Golding testified that a physically fit person should have a proper level of muscle and of body fat. In his opinion, while, in the extreme, obese or underweight conditions would indicate that a person did not have the proper allocation of body fat and muscle, the exact weights listed on the table in Footnote 3 are not indicia of fitness (although they would represent average weights for fit persons).

He suggested that it is a common practice in some police departments and schools to measure the percentage of body fat through a formula. The person's fat layer is measured

in three points in the body. When these measurements are inserted into a formula, an accurate measure of body fat results. Therefore, there would be no reason for utilizing a minimum weight to measure body fat and therefore fitness, except perhaps a five minute timesavings in testing.[8/] For this reason, the requirement of a 150-pound minimum weight is not related to physical fitness as required for the police officer.

3. Physical Agility.

In performing many of the functions described above, the police officer must react quickly. Although agility may relate to many skills, the only conceivable relationship between agility requirement and height or weight for the police officer is with respect to running after a suspect. However, Professor Golding testified that the height requirement would relate to such speed only in the case of long-range running, while the agility required for the police officer's job performance is only short-range running. He further testified that there was no relationship between the

8/ Administrative cost savings does not justify the maintenance of a requirement which excludes on the basis of sex. Reed, supra; Frontiero, supra.

minimum weight requirement and agility. His expert testimony was uncontradicted in these respects.

4. Ability to View Crowds.

Police patrolmen are at times required to patrol in crowds such as at athletic events. They also retain the readiness to patrol at riots, should a riot develop. The Police Chief testified that, since the average person is about 5 feet 8 inches in height, a police officer should, if possible, be taller than the average person so that he may see and be seen in crowds.

His conclusion is, however, based upon two erroneous assumptions. He assumes, first, that the crowd is a uniform 5 feet 8 inches, so that a person taller than the average could see and be seen in crowds. However, about 15 per cent of all persons between 18 and 79 years of age are over 5 feet 10 inches in height. About 5 per cent of that group are more than 6 feet in height. Therefore, when one speaks of having a height above the crowd, one must refer to someone well over the average height. Second, he assumes that, as far as viewing the crowd or being viewed is concerned, the officers or crowd participants' eyes will be located at the top of the head. Since this is usually not the case, one must add an additional several inches to the height required to see or be seen in the crowd. Thus, a 5 feet 8 inch height requirement obviously has no logical

relationship to either viewing crowds or being viewed by them.

5. Ability to Drive Car.

Since the uncontradicted expert testimony of Dr. Stoudt of Harvard University was that cars were designed to accommodate 90 per cent of the population without modification and since this would include everyone over 5 feet in height, a 5 feet 8 inch height requirement could have no relationship to the requirement that police officers must be able to drive cars.

6. Arm Reach.

The expert testimony established that the length of the arms is directly related to height. Therefore, the question is whether the length of the arm is related significantly to job performance of the police officer.

Defendants argue that in the situation of a person resisting arrest, when twisting arms and other restraining methods fail, there might be an occasion when a fist fight would ensue in which the person who had the advantage as to reach could conceivably hit the other person while standing far enough away to avoid blows from the other person. Defendants were unable to show that this situation was one which occurred with any degree of frequency.

Plaintiffs' expert, an instructor in self-defense techniques at Case Western Reserve University and in restraining techniques taught to several police departments, testified that with respect to either restraining or

self-defense techniques, arm length was not a significant factor. (The officers are also taught some aspects of juijitsu and the use of the night stick to restrain without necessarily harming the resisting person.) For example, with respect to juijitsu tournaments, there are no height and weight classifications. In fact, the expert witness, who was herself 5 feet 2 inches, was often matched in tournaments against persons six feet and above. The evidence of the juijitsu tournaments is helpful in pointing out the minor role which arm length would have in all other aspects of physically subduing a resisting person. 8/

7. Ability to Absorb Blows.

Defendants argued, without expert testimony, that a person over 5 feet 8 inches and over 150 pounds could more adequately absorb blows received while restraining a resisting person. No substantive evidence supports this argument.

8/ Plaintiffs proffered a demonstration regarding restraining and self-defense techniques. The Court permitted the demonstration but now rules that it is inadmissible as substantive evidence.

8. Ability to Impress Other with Physical Prowess and Other "Unmeasurable" Advantages of Height.

Those testifying for the Police Department and Civil Service Commission were apparently most concerned with what they considered to be the psychological impact of having all their officers over 5 feet 8 inches. They theorized that, if the officer was taller than the person he was controlling or arresting, the shorter person would be deterred from assaulting the officer by the officer's apparent physical superiority. They claimed that their experience demonstrated that taller officers were less often attacked and, when attacked, less often and less severely injured than shorter officers. Thus, they contended, if those shorter officers among persons in the 5 feet 8 inch to 6 feet 6 inch range were more often and most successfully attacked, it would be logical to assume that those under 5 feet 8 inches would be attacked even more often and injured ever more severely.

However, the facts supplied by defendants regarding assaults and injury records do not substantiate the arguments regarding the

effect of height among those already employed. Of the 30 reported assaults of East Cleveland Police officers from 1969 through 1972, more than half involved situations in which the assailant was shorter than the police officer. Therefore, in more than half of the situations, the height differential did not deter an attack on the officer. The weight differential evidence is inconclusive since weights of the officers and attackers were available only in a few instances.

The figures regarding the heights of those officers assaulted relative to the rest of the Department do not substantiate the argument that shorter officers are assaulted more often. From 1969 through 1971, the median height of the officers was apparently about 5 feet 11 inches. During that period 6 of the officers assaulated were under 5 feet 11 inches, 6 of the officers assaulted were 5 feet 11 inches, and 8 of the officers assaulted were over 5 feet 11 inches. At the end of 1972, the median height was 6 feet (because 7 of the 9 officers hired during 1972 were 6 feet and over). Of the officers assaulted during 1972, 7 officers were under 6 feet and 3 were over 6 feet. When the assaults for the entire period of 1969 through 1972 are totalled, the issue of whether shorter officers were assaulted more often depends on whether the median height for the first years is used or whether the median height as it existed at

the end of 1972 in [sic] used. In any case, the figures supplied as to assaults do not substantiate the argument that shorter officers were assaulted more often.

Defendants also total the days taken off for injury incurred during an arrest from 1969 through 1972 by officers under 6 feet and compare this total with a similar total for officers over 6 feet. However, this comparison provides no real measure of the relationship between height and injury. Of the 117 days taken off as the result of such injuries, 101 were taken off by 3 men as the result of 3 injuries. Two of the three men were shot and one was injured in the eye by a mental patient--obviously not injuries related to height or weight disadvantage. Thus, these figures provide no assistance to the Court in determining the general effect of height regarding injury.

D. Conclusion

The height and accompanying weight requirement were maintained and enforced by defendants as a part of a process to hire only males as police officers and with the effect and intent to exclude nearly all women applicants. The Court is unable to find

rational support for the height and weight requirements and concludes that the requirements are based solely on the stereotype of the large male police officer.

The expert testimony from other parts of the nation leads the Court to believe that the failure of defendants to provide a rational explanation for the height and weight requirements is not unusual. Terry Eisenberg, an industrial psychologist employed by the International Association of Chiefs of Police, Inc., stated that as a result of substantial inquiry, he had found no support for a relationship between height and police work. Carl K. Wettengel, Director of Personnel for the State of Wisconsin, and his subordinate, Richard Brainerd, stated that in his opinion, based on inquiry and study of height requirements in 34 city police departments, there was no rational support for a relationship between height and police work.

It is significant that the Court has been unable to find any agency or authority which has reviewed the relationship between the height and weight requirement and police work on the basis of facts and which has arrived at a contrary conclusion. The Law

Enforcement Assistance Administration refuses to permit departments receiving its funds to retain height requirements unless they first show through supportive factual data such as professionally validated studies that the requirement is an "operational necessity" for designated job categories. 38 Fed. Reg. 4553, G. 5 (March 8, 1973). The Administration's Guidelines provide in part:

> The use of minimum height requirements, which disqualifies disproportionately women and persons of certain national origins and races . . . . will be considered violative to this Department's regulations prohibiting employment discrimination. Id. G. 4.

The Iowa Civil Rights Commission after a finding that the height and weight requirements for the Des Moines Police Department had a disparate effect against women and had no rational basis, order the Police Department to cease using it "until such time as they are properly able to validate in a professional manner such requirements for job-relatedness." Nancy L. Moore v. City of Des Moines Police Department, CP #881, Iowa Civil Rights Commission (July 11, 1973). The Pennsylvania Attorney General ordered a 5 feet 6 inch requirement for state

police suspended until it could be demonstrated as related to job performance because it excluded women and some minority groups. [CCH] EPD ¶5177 (1973).

The Court therefore finds that the height and weight requirements arbitrarily discriminate against women in restricting them from employment as police officers in violation of the Civil Rights Act of 1871, 42 U. S. C. §1983, and the Equal Protection Clause of the Fourteenth Amendment.

IV. WRITTEN EXAMINATION

The written examination, the Army General Classification Test (AGCT), is a major factor in the rating of applicants for certification. In particular, the AGCT score is added to the physical fitness and weighted as a possible 60 points out of a possible 130 points. Plaintiffs claim that the examination is discriminatory against black and female applicants and that the examination is not related to job performance under the standards set by law.

The AGCT has been administered by the Civil Services [sic] Commission as part of the qualifying process for police officers since 1957, with the exception of 1972 when a different examination was administered. It was developed for Army use to classify enlisted personnel during World War II.

In 1947 it was released for civilian use as a general aptitude test and it has not been modified since that date. The 150 questions on the examination are divided into 50 questions each on spatial relations, vocabulary, and mathematical reasoning. The test is administered as a timed examination with a calculation for wrong answers designed to penalize guessing.

A. Race Discrimination Claim.

1. Prima Facie Showing

The overwhelming majority of courts faced with claims of racial discrimination in employment under 42 U. S. C. §1983 have ruled that plaintiffs may make a prima facie showing of discrimination without actual proof that the defendants were motivated by racial prejudice in their choice and use of the examination. Carter v. Gallagher, 452 F. 2d 315, 323 (8th Cir. 1971) (en banc); Chance v. Board of Examiners, 458 F. 2d 1167 (2d Cir. 1971); Castro v. Beecher, 459 F. 2d 725 (1st Cir. 1972); Bridgeport Guardians, Inc., supra; Harper v. Mayor & City Council 5 FEP 1050 (D. Md. 1973); The Shield Club, supra. See also cases cited in Footnote 5, supra. The Court may consider the fact that defendants have continued using an examination with the knowledge that it has a highly

disparate effect on minority groups as sufficient to create a prima facie showing of discrimination which may be rebutted only by a showing that the examination is rationally related to job performance. In this case, therefore, it is relevant to inquire into both the impact and the evidence of disparate impact which was available to the defendants in choosing the test. The Civil Service Commission had available to it both the Technical Manual on the AGCT, provided by Science Research Associates, and the results of examinations in previous years.

The Technical Manual indicates that the AGCT was originally normalized only on adult white enlisted men. Later studies attempting to normalize the AGCT with respect to blacks indicated that the blacks scored lower than whites in the given groups tested. Science Research Associates, Inc., Technical Report for the First Civilian Edition of the Army General Classification Test 29. The Technical Manual warns:

> Since the AGCTquantitative and verbal parts have items that are informational in type, and since speed is a factor, it may be expected that scores for those items would be somewhat depressed for culturally deprived groups. Id.

The examination clearly had a disparate effect on blacks taking the examination in East Cleveland. The Court was provided with statistics from the administration of the AGCT in 1969, 1970, and 1973, to 101, 97, and 103 applicants respectively. In each case a third or more of the applicants were black (33 per cent of the applicants in 1969, 44 per cent in 1970 and 39 per cent in 1973 were black). The calculations regarding the comparison of black and white applicants who received a raw AGCT score of over 100, listed in the table below, demonstrate the highly disparate effect:

PERCENTAGE OF RACIAL GROUP RECEIVING RAW AGCT SCORE OVER 100[9/]

	Blacks	White
1969	15 per cent	41 per cent
1970	9	63
1973	22	71

9/ There is no "passing score" on the examination. However, in the past most of those placed on the certified list had a raw AGCT score of 100 or better on the examination. Therefore, 100 has been chosen for purposes of this comparison.

In 1973 the average raw AGCT score for black applicants was 83.2 while the average raw AGCT score for white applicants was 106.4. Both plaintiffs' and defendants' experts agreed that the disparate effect of the AGCT on the basis of race was highly significant and that the likelihood of the difference in scores occurring by chance alone was minimal.

In addition to the evidence concerning the effect of the examination, the Commission was aware that as late as 1973 that the population of East Cleveland was 60 per cent black while only 12 per cent of the officers were black.

When the facts available to the Commission are compared with those found to be disparate enough to warrant a prima facie finding of discrimination in other public employment cases under 42 U.S.C. §1983, it is clear that they are sufficient to warrant a prima facie showing of discrimination. See cases cited in Footnote 5, supra.

Defendants rest their contention that there has been no prima facie showing on three arguments. First, they argue that a third of those hired since 1968 have been black, which is not substantially lower than the percentages (about 33 to 44 per cent) of the applicants who have been black, and that there has therefore been no discrimination. However, the explanation for the high

numbers of blacks hired is that 75 per cent of the black applicants were veterans and were therefore entitled to a 20 per cent veterans' preference while only 36 per cent of the white applicants were veterans. Since defendants admit that military experience is related to job performance, these statistics would indicate that in one aspect blacks were more often better qualified than whites. The fact that some blacks were better qualified in one aspect does not justify defendants in unfairly penalizing blacks on the examination if it is not also job related. Therefore, this argument does not dispel the prima facie finding made by the Court.

Second, defendants argue that the disparate effect on the examination results from the fact that 63 per cent of the white applicants had some college experience (had taken at least one college course), while only 35 per cent of the black applicants had some college experience. A similar argument was made by defendants in Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, supra, where the educational background of the white applicants was also arguably superior to that of the minority applicants. In rejecting the argument, the Court was apparently influenced by the desire not to permit past discrimination in educational

opportunities to exclude minority applicants where that education was not related to job qualifications. Judge Newman pointed out:

> More fundamentally, this date fails to remove the prima facie showing of discrimination because it does not alter but only tries to explain, the difference in passing rates. Even if defendants' evidence could establish that this difference is due in large part to the quality of schooling, a prima facie showing of discrimination would nonetheless remain if a test is used that significantly separates the applicants by any factor, including poor quality of schooling, and race or ethnic origin correlate highly with this factor. See Castro v. Beecher, supra; cf. Beal v. Lindsay, 468 F. 2d 287 (2d Cir. 1972). Of course this does not mean that a test cannot be used whenever those with poor schooling score less well than those with good schooling. But if members of a minority group score significantly less well than others, then even if this result seems from the poor schooling many of them received, the burden shifts to the employer to provide some adequate

> justification for use of the test. It may well be that good schooling provides attributes needed for job performance; if so, it should not be difficult to demonstrate the validity of the test. Id. 8502. See also McDonnell Douglas Corp. v. Green, ____ U. S. ____, 36 L. Ed. 2d 668, 680 (1973).

Third, defendants emphatically deny any intent to discriminate. They point out that they conducted an extensive campaign to recruit black applicants in 1968 and 1969 and that two of the three Civil Service Commissioners as well as six of the ten named defendants are black. They also note that the Civil Service Commission discussed the disparate effect of the AGCT examination on blacks but were unable to locate a written aptitude examination which did not also have a disparate effect. While impressed with the good faith of defendants from 1968 to date, the Court cannot, as a matter of law, rule that the good faith efforts are sufficient to negate a prima facie showing of discrimination on the examination. The law permits an inference of a discriminatory intent when a practice having a highly disparate racial effect is used without an investigation to

ascertain if the rest is predictive of job performance, regardless of the good faith of the individuals involved. Furthermore, the inability of defendants, after a few telephone inquiries, to locate a fairer test does not excuse the continued use of an examination with a highly disparate effect if the test is not predictive of job performance.

For these reasons, plaintiffs have presented a prima facie showing of racial discrimination. This is not, of course, equivalent to a showing of unlawful discrimination but is sufficient to require that defendants demonstrate that the AGCT results are predictive of job performance.

2. Validity of AGCT for Police Department.

Once a prima facie showing of racial discrimination has been presented, it is unclear what standard of review is applied regarding the justifications given for using the examination. The First Circuit standard of review was stated in Castro v. Beecher, 459 F. 2d 725, (1st Cir. 1972):

> It (the public employer) may not . . . rely on any reasonable version of the facts, but must come forward with convincing facts establishing a fit between the qualification and the job. Id. 732.

In accord, The Shield Club v. City of Cleveland, supra. The Second Circuit in Chance v. Board of Examiners, 458 F. 2d 1167, 1177 (2d Cir. 1972), required defendants after a prima facie showing to satisfy a "heavy burden of proof" on the question of whether the examination was job-related. See Bridgeport Guardians, Inc., supra. See also Harper v. Mayor & City Council, 5 FEP Cases 1050, 1038 (D. Md. 1973) ("Employment tests which are shown to eliminate a disproportionate percentage of one racial group must be demonstrably accurate measures of job performance."); Commonwealth of Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1090-1092 (E. D. Pa. 1972) aff'd in part by equally divided court, rev'd on other grounds, 473 F. 2d 1029 (3d Cir. 1972) (en banc). In essence, the defendant is required to prove to the Court that the examination having a disparate effect is demonstrably job-related. Defendants here attempt to provide such evidence that the AGCT is a valid predictor of job performance through three arguments.

a. AGCT Manual

Defendants argue that the Technical Manual for the AGCT provides adequate evidence that the AGCT is job related. However, the Manual discusses no study relating the AGCT to performance as a police officer. The only validation studies reported in the Manual related to performance in the

military vocational schools (including a police academy) and other educational institutions. Moreover, the AGCT validation studies were apparently done with respect to whites only. There is no evidence in the Manual that the AGCT is a valid predictor of performance for blacks. Therefore, the AGCT Manual is inadequate to show that the examination is job-related.

b. Subjective Analysis

Defendants reason that because their Police Department is, in their opinion and in that of some others, a good police department, the AGCT must have done a good job of screening police candidates. The number of assumptions implicit in this conclusion are too numerous to mention. If the Court accepted this conclusion, it would also permit the use of discriminatory testing procedures in every instance in which the present employees were performing adequate work. Certainly, more is required prior to permitting the continued exclusion of large numbers of black applicants. As Judge Young commented in Harper v. Mayor & City Council, supra: "[T]he law does not afford public employers the luxury of reliance on an untested assumption when the tests which proceed from that assumption adversely effect [sic] one racial group."

c. Objective Analysis

Because testing procedures themselves are a product of the psychological community, the proof of their validity must also be based on the psychological standards. Bridgeport Guardians, supra. Both plaintiffs' and defendants' experts agreed on the proper procedure in attempting to validate a test regarding job performance.

The method of validation considered preferable by trial experts is criterion-related validity. See EEOC Guidelines, 29 C.F. R. §1607.5(a). Under criterion-related validity, the defendant is required to demonstrate that the test scores correlate significantly with external variables which are a direct measure of job performance. Id. 10/ It requires a job analysis, testing, and then an objective review to determine whether performance on the test relates to success in significant job functions. Bridgeport Guardians, supra.

10/ The Guidelines adopt the procedures approved by the American Psychological Association in "St andards for Educational and Psychological Tests and Manuals." The latter publication discussed test validity on pages 12 through 24.

Defendants attempted to meet the criterion-related validity test by showing that AGCT scores correlated significantly with the police training course grades, promotion, and criteria for promotion--the promotional examination score and the efficiency-in-service ratings. Defendants' expert, Dr. Byron Svetlik, admitted however that he was unable to state that any of the above-listed measures correlated with job performance and admitted that he knew of no job analysis. In addition, he admitted that the efficiency-in-service ratings were subjective in nature and were not done in such fashion that he would predict them to be reliable measures of job performance. There was no indication that the promotional examination results, the police academy grade, or the promotion (a partial result of the efficiency in service and promotional examination) were related to job performance. Furthermore, defendants could not relate the AGCT scores with any measures relating to blacks. In fact, the numbers of blacks hired are insufficient to provide the analysis. The fact that no blacks have ever been promoted makes slightly suspect the fairness of the efficiency in service ratings, promotional exam and other indicia of promotion. In essence, all defendants have done is related one unvalidated testing or evaluating method with another. The other testing methods may or

may not have a disparate effect on blacks as well and may be totally unrelated to job performance.

The Court also permitted evidence on two additional methods of validation-content and construct validity. Content validity involves the identification and testing of certain job-related skills. Since applicants for police officer are trained and are not expected to have certain skills at the time of application, this method of validation would not be relevant here. Constructive validity involves the determination of which constructs or traits are required for job performance, the selection of a test to measure those traits, and then the subsequent testing to determine if the test is predictive of the traits desired. Defendant's expert, Dr. Lawrence Perney, testified that in his opinion the AGCT screened for eighth grade level vocabulary (although a better educated person would be expected to excel) space perception and twelve-grade level mathematics. However, he admitted that he did know whether and to what degree these traits were those which would be necessary for job performance as the police officer. Defendants also presented testimony that some level of reasoning, language, math and perceptual ability was needed to make reports of traffic accidents and testify in court.

However, there was no evidence of the level of skill required for performance. With no job analysis to determine the level of ability required in a given area, defendants may well be screening out persons for lack of skill in an area for which the level tested is not required.[11/] Furthermore, defendants did not follow-up the test to determine whether scoring on the AGCT correlated with the existence of the traits desired.

In essence, defendants are contending that a general aptitude test to measure ability may be used because they want fairly intelligent police officers. If such a justification were permitted for police officers without research as to the level of competence required with respect to language or mathematics, it is difficult to imagine what kind of employment could not also justify the use of such a test.

11/ For example, it is conceivable that the level of vocabulary required to score sufficiently well to be certified is well beyond that needed for daily police activities. Vocabularly [sic] tests are often particularly discriminatory against minority groups and may result in screening out many blacks sufficient to perform police work well.

At the same time, the expert testimony related that the studies to date indicate that blacks often perform far better on the job than aptitude tests indicate. Thus, a ruling that the need for such vague traits as general intelligence, language skills and ability to reason may support the use of such aptitude tests as the AGCT which have a highly disparate effect on blacks, without a study of the level of skill required for the job, will effectively preclude any challenge to testing procedures. For this reason, the Court will require a more specific job validation than that attempted by defendants prior to subsequent use of the AGCT.

B. Sex Discrimination Claim.

Since only two female applicants have taken the AGCT to qualify for police officer in East Cleveland, the major issue presented by the claim that the examination discriminates on the basis of sex is the method of review to be applied when the numbers are too small to permit a conclusion as to the disparate effect of the examination.

Several courts faced with a similar issue have refused to rule that a prima facie case of discrimination has been established. Castro v. Beecher, supra; Bridgeport Guardians, Inc., supra. Indeed, the Court is unable to find any authority for requiring defendants to validate

the test where the statistical evidence of disparate effect is insufficient and there is no evidence of discriminatory intent in adopting the examination.

At the same time, it is troublesome that the evidence presented indicates a high probability that the examination will have such a disparate effect. Although the studies in the field show that women and men score differently with respect to math and verbal, defendants have used an examination designed and originally normalized for men only. Furthermore, the AGCT Technical Manual indicates that when attempts were made to normalize the AGCT with respect to women, the women scored lower on the average than men in the same group. Technical Manual, supra at 14-16, 30. Finally, one of plaintiffs' experts testified to a likelihood of disparate effect regarding the spatial relations portion of that examination and regarding the guessing penalty.

While normalization would therefore be advisable, the Court is without authority to compel it as a constitutional requirement.

C. Conclusion

Although the discussion must of necessity deal with the evidence and the law related to discrimination, the Court cannot help but

consider the effect a finding of racial discrimination with respect to the written examination will have on a small suburban police department. Proper validation of the testing under the procedures described by plaintiffs' expert Dr. Barrett and defendants' expert Dr. Svetlik will be costly and time-consuming.

It does appear, however, that practical means to achieve a fair test do exist through a pooling of efforts. What is most offensive is the use of a discriminatory examination which has not been related to performance of the police officer anywhere known to defendants. The Court may take judicial notice of a growing number of police departments which are seeking a test which either does not have a disparate effect on blacks or which is related to the job performance of a police officer. Bridgeport Guardians, Inc., supra; The Shield Club, supra. It is reasonable to conclude that, just as individual police departments have not written their own examinations in the past, they may also draw on a common fund for a new examination which will meet the requirements of the Fourteenth Amendment.

The Court is also concerned with the fear expressed during trial by plaintiffs' expert Dr. Svetlik that the Court decisions regarding discrimination may impair the progress made in the adoption of objective rather than subjective examination for public employment.

Still, it concludes on the basis of the trial testimony that because the factors which produce a cultural bias in test results are known in the testing field, it will be feasible to write a culture fair test for police applicants. In addition, the Court is unconvinced that tests which discriminate are really "objective" where they are not demonstrably job related. The Court agrees with Judge Goldberg's analysis in his dissent to Allen v. City of Mobile, 466 F. 2d 122 (5th Cir. 1972):

> It is now recognized that a test can be impeccably 'objective' in the manner in which the questions are asked, the test administered, and the answers graded, and still be grossly 'subjective' in the educational or social milieu in which the test is set. Id. 123.

For these reasons, the Court concludes that its ruling in this case should not set back the healthy trend toward the use of objective standards in public employment.

The evidence shows that the examination in this case discriminates against black applicants. In light of this discrimination, defendants have the burden of demonstrating to the Court that the examination is job related. The evidence indicates that the

AGCT which was developed on white enlistees to classify within the segregated Army has never been validated regarding performance of either whites or blacks as police officers. The Court rejects the attempts to validate the test in East Cleveland with respect to promotional criteria, since these criteria have never themselves been related to job performance and since no black has been promoted in the history of the Department, and with respect to a police training test score, since this too has not been shown to relate to job performance. Given an examination which has a grossly disparate effect on black applicants, the defendants' evidence was not sufficient to demonstrate job-relatedness.

Regarding the claim of sex discrimination, a different situation is presented. Plaintiffs have not shown that the examination has been a barrier to employment for women. Therefore, the Court does not find a sufficient basis to invalidate the examination as it relates to sex.

V. VETERAN'S PREFERENCE

Plaintiffs challenge the timeliness of applying a preference for veterans on the grounds that it discriminates on the basis of sex, that it amounts to a special law which is prohibited under the Ohio Constitution, and that it violates Ohio Rev. Code §143.16.

The statute requiring a preference for

veterans provides in relevant part:

> All applicants for positions and places in the classified service shall be subject to examination which shall be public,. .. provided any soldier, sailor, marine, coast guardsman, member of the auxiliary corps as established by congress, member of the army nurse corps or navy nurse corps, or red cross nurse who has served in the army, navy, or hospital service of the United States, and such other military service as is designated by contress,[sic] including World War I, World War II, or during the period beginning May 1, 1949, and lasting so long as the armed forces of the United States are engaged in armed conflict or occupation duty, or the selective service or similar conscriptive acts are in effect in the United States, whichever is the later date, who has been honorably discharge therefrom, or transferred to the reserve with evidence of satisfactory service, and is a resident of Ohio, may file with the director a certificate of service or honorable discharge, whereupon he shall receive additional credit of twenty per cent of his total grade

> given in the regular examination in which he receives a passing grade. Such examination may include an evaluation of such factors as education, training, capacity, knowledge, manual dexterity, and physical or psychological fitness. Examinations shall consist of one or more tests in any combination. Tests may be written, oral, physical, demonstration of skill, or an evaluation of training and experience and shall be designed to fairly test the relative capacity of the persons examined to discharge the particular duties of the position for which appointment is sought. Ohio Rev. Code §143. 16

Defendants apply the veterans preference to the written examination before deciding whether the applicant may take the oral examination. In addition, they apply the preference prior to determining whether the applicant has passed the examinations. Such practices are in violation of the procedure prescribed by state statute-namely that the department should first determine whether the applicant has passed the entire examination (including both written and oral) and only then apply the veterans preference.

Since the Court may rule on this claim under state law on the basis of its pendent

jurisdiction, it does not reach the constitutional arguments raised by plaintiffs.

VI. ATTORNEYS' FEES

Since there is no statutory provision for attorneys' fees under 18 U. S. C. §1983,[sic] attorneys' fees should be allowed only when public policy would require it. Knight v. Auciello, 453 F. 2d 853 (1st Cir. 1972), cited in Northcross v. Board of Education, ___ U. S. ___, 37 L. Ed. 2d 48, 51 n. 2 (1973). The Court should consider the degree to which a public right is asserted by plaintiff and the extent to which defendant has engaged in deliberate wrongdoing. Id.; Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971).

In this case, defendants have not deliberately embarked on a course of discrimination at least with respect to racial discrimination and have, in fact, prevailed in their defense against one of plaintiffs' claims. In the exercise of its discretion, the Court declines to award attorneys' fees to plaintiffs.

VII. RELIEF

On the basis of the reasoning above the Court rules that:

1. Defendants' enforcement of the minimum height and weight requirements for police officer applicants in East

Cleveland unlawfully discriminates against women;

2. Defendants' use of the AGCT to screen applicants unlawfully discriminates against blacks; and

3. Defendants' application of the veterans' preference prior to determining whether the candidate is qualified violates Ohio law.

In determining the proper relief, the Court must also consider any history of discrimination. With respect to the discrimination, the evidence indicates that defendants have already made positive efforts to erase the effects of past discrimination through recruitment. Therefore, the Court is not inclined to order affirmative relief with respect to past discrimination. However, it will enjoin the further use of the AGCT examination which unlawfully discriminates against black applicants.

With respect to sex discrimination, the Court is convinced that there has been past discrimination. However, because the Court does not know the numbers of those women who have applied but for the height and weight requirements, it is inclined to order only

limited affirmative relief for the past discrimination. It will, however, enjoin further enforcement of the minimum height and weight requirements.

The Court is aware that there is some leeway in fashioning relief. It therefore requests the defendants to file a proposed plan for implementation of the Court's rulings within twenty days of the date of this Order. The plaintiffs are ordered to respond to the plan within ten days thereafter. A hearing to discuss final relief will be held on October 12, 1973. Pending such a hearing the interim relief heretofore granted will remain in effect.

IT IS SO ORDERED.

(signed) Thomas D. Lambros
Thomas D. Lambros
United States District
Judge

Dated: September 6, 1973

Nos. 73-2226 and 73-2227

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ELIZABETH A. SMITH, on behalf of herself and all others similarly situated,
Plaintiff-Appellee,

v.

ROBERT TROYAN, REGINALD GOWER, JAMES RITCHIE and JAMES BARRETT,
Defendants-Appellants.

ELIZABETH A. SMITH, on behalf of herself and all others similarly situated,
Plaintiff-Cross-Appellant,

v.

CITY OF EAST CLEVELAND, ET AL.,
Defendants-Cross-Appellees.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed July 3, 1975.

Before: WEICK, CELEBREZZE and PECK, Circuit Judges.

PECK, Circuit Judge. Plaintiff-appellee, a five-foot, five-inch, 136-pound black woman, filed in district court a class action against certain "city defendants"[1] and certain "federal defen-

[1] Plaintiff named as "city defendants" East Cleveland, its city manager, its police chief, five city commissioners, and three city civil service commissioners. The district court dismissed plaintiff's

dants"[2] charging that the city's use of minimum height and "proportionate" weight requirements in hiring its police officers unconstitutionally discriminated against her on the basis of sex and that the city's similar use of the Army General Classification Test (AGCT) unconstitutionally discriminated against her on the basis of race and sex.[3]

The district court found that the height and weight requirements discriminated against women, that the AGCT discrim-

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claims against the city for lack of jurisdiction and against the city manager and the city commissioners because plaintiff "ha[d] failed to show any non-legislative function [they had] performed . . . [which had] denied plaintiffs equal protection of the laws." 363 F. Supp. 1131, 1135 (N.D. Ohio 1973). There has been no appeal of those dismissals.

2 Plaintiff named as "federal defendants" the administrator and regional director of the Law Enforcement Assistance Administration (LEAA). Allegedly, LEAA awarded funds to the city, the funds were used for a community service officer program, and no women were enrolled in the program. By pretrial order, the district court severed plaintiff's claim against the federal defendants from her claim against the city defendants. After trial, plaintiff moved the district court to dismiss her claim against the federal defendants without prejudice. The city's law director, apparently representing the federal defendants, thereafter moved that plaintiff's claim against the federal defendants be dismissed with prejudice. The record reflects no disposition of the motions to dismiss.

3 Plaintiff also alleged that the use of the height and weight requirements and of the AGCT violated 42 U.S.C. §§ 1981, 2000d. With the severance of plaintiff's claim against the federal defendants, see footnote 2, *supra*, plaintiff apparently abandoned her section 2000d claim because of representations that East Cleveland uses no federal funds in hiring police officers. Noteworthily absent in plaintiff's complaint, which was filed on March 23, 1973, were references to Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* Section 2000e(a) was amended in 1972 to bring governments, governmental agencies, and political subdivisions within Title VII. Pub. L. No. 88-352, § VII, 78 Stat. 253. See *Zichy* v. *City of Philadephia*, —— F. Supp. —— (No. 72-1810, E.D. Pa., filed March 19, 1975); *Kirkland* v. *New York State Dep't of Correctional Services*, 374 F. Supp. 1361, 1364 (S.D.N.Y. 1974). Of course, what Title VII compels may differ from what the equal protection clause, in itself, compels. See *Communications Workers of America* v. *American Tel. & Tel.*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel* v. *Liberty Mut. Ins. Co.*, 511 F.2d 199, 203 (3rd Cir. 1975), petition for cert. filed 43 U.S.L.W. 3540 (April 2, 1975); *Satty* v. *Nashville Gas Co.*, 384 F. Supp. 765, 768-771 (M.D. Tenn. 1974), appeal pending —— F.2d —— (6th Cir. ————). But see *Afro American Patrolmens League* v. *Duck*, 503 F.2d 294, 301 (6th Cir. 1974); *Davis* v. *Washington*, 512 F.2d 956, 957-58 n. 2 (D.C. Cir. 1975).

inated against blacks, and that, as a matter of state law, a veteran's preference had been applied improperly. The court, however, found insufficient evidence that the AGCT discriminated against women. 363 F. Supp. 1131 (N.D. Ohio 1973).

Defendants have appealed from the district court's findings of unconstitutional discrimination as to the height and weight requirements and as to the AGCT.[4] Plaintiff has cross-appealed from the district court's refusals to find that the AGCT unconstitutionally discriminates against women and to award attorney's fees.

HEIGHT REQUIREMENT

East Cleveland Administrative Code § 123.07(d) requires police applicants to "be at least five feet, eight inches in height . . . ." The district court found no "rational support" for and invalidated the requirement. A detailed, in-depth discussion probing the height requirement's relationship, or lack thereof, to physical strength, physical fitness, physical agility, ability to view crowds, ability to drive cars, arm reach, ability to absorb blows, and psychological advantage, however, preceded the court's finding.

On appeal, defendants claim that the height requirement, though disqualifying disproportionately more women than men, is a non-gender-based classification and, consequently, constitutionally permissible through the relaxed standard of equal protection review. Even if the height requirement were considered a gender classification, defendants claim it would be constitutionally permissible.

Few reported opinions have directly assessed the constitutionality of height requirements. See Callis, Minimum Height

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4 By order, a panel of this court on April 4, 1974, rejected plaintiff's motion to dismiss defendants' appeal for lack of subject matter jurisdiction. The order read,

> "[T]o the extent the Memorandum Opinion and Order issued by the District Court on September 6, 1973, is not a final judgment, but is an interlocutory order granting injunctive relief, the same is appealable under 28 U.S.C. § 1292(a)(1)."

and Weight Requirements as a Form of Sex Discrimination, 25 Labor L. J. 736 (1974). *Hardy* v. *Stumpf*, 37 Cal. App. 3rd 958, 112 Cal. Rptr. 739 (1st Dist. 1974), invalidating a five-foot, seven-inch requirement for Oakland police officers, relied heavily on the instant district court's reasoning and on the "suspect" character of the height classification. Other height requirements for various occupations have been invalidated on the basis of state statutes. See, e.g., *New York State Div. of Human Rights* v. *New York City Dep't of Parks & Recreation*, 38 App. Div. 2d 25, — N.Y.S. 2d — (1971) (municipal lifeguard), *New York State Div. of Human Rights* v. *New York-Pennsylvania Professional Baseball League*, 36 App. Div. 2d 364, — N.Y.S.2d —, aff'd, 29 N.Y.2d 921, — N.Y.S.2d — (1972) (baseball umpire), and *Moore* v. *City of Des Moines Police Dep't*, 2 CCH Empl. Prac. Guide ¶ 5184 (CP No. 881, Iowa Civil Rights Comm'n, filed July 11, 1973) (police). See also *In Re Shirley Long*, U.S. Civil Serv. Comm'n Bd. of Appeals & Review (Nov. 13, 1972). Of four courts which have refused to invalidate police height requirements, only one sustained the height requirement in light of evidence of the sexually disparate impact of the height requirement. Compare *Hail* v. *White*, 8 CCH Empl. Prac. Dec. ¶ 9637 (N.D. Cal. 1973) (sustaining height requirement against Title VII claim), with *Castro* v. *Beecher*, 459 F.2d 725, 734 (1st Cir. 1972), *Arnold* v. *Ballard*, 9 CCH Empl. Prac. Dec. ¶ 9921 (N.D. Ohio 1975), and *Mulligan* v. *Wilson*, 110 N.J. Super. 167, 264 A.2d 745 (1970). Still other courts have found it unnecessary to decide the legality of certain height requirements. See, e.g., *Pond* v. *Braniff Airlines, Inc.*, 500 F.2d 161, 162 (5th Cir. 1974), rev'g 6 CCH Empl. Prac. Dec. ¶ 8756 (N.D. Tex. 1973); *Lum* v. *New York City Civil Serv. Comm'n*, 9 CCH Empl. Prac. Dec. ¶ 9947 (S.D.N.Y. 1975).

The Supreme Court and this court, however, have recently dealt often with gender or gender-related classifications. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), recognized that for constitutional purposes a classification even with an impact

exclusively on one gender need not necessarily be treated as if an explicit gender classification.

> "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis . . . .
>
> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." 417 U.S. at 496-97 n. 20.

See Comment, *Gedulgig* v. *Aiello*, Pregnancy Classifications and the Definition of Sex Discrimination, 75 Colum. L. Rev. 441, 443-48 (1975) [hereinafter Pregnancy Classifications]. Height requirements create even less exclusively gender-related classes. While one of the two *Geduldig* classes was exclusively of one gender, neither of the East Cleveland classes is exclusively of one gender. The class of persons too short to be eligible consists approximately of 95 per cent of the women and 45 per cent of the men between the eligible ages; the class of persons tall enough to be eligible consists approximately of five per cent of the women and 55 per cent of the men.[5]

[5] The East Cleveland height requirement, as the district court recognized at trial, was applied to men and women and, consequently, disqualified men as well as women. Such height requirement differs from applying requirements only to women, see *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763, 773-74, 790 (D.D.C. 1973), and likewise differs from applying more stringent requirements to women than to men. See *Berkelman* v. *San Francisco Unified*

Like the Supreme Court in *Geduldig*, lower federal courts have sustained state action disproportionately, or exclusively, affecting one gender. See, e.g., *Reynolds* v. *McNichols*, 488 F.2d 1378, 1383 (10th Cir. 1973) (city "hold and treat" ordinance for prostitutes); *Bond* v. *Virginia Polytechnic Institute & State University*, 381 F. Supp. 1023 (W.D. Va. 1974) (university student health plan's failure to provide for gynecological examinations and pap tests).

Even if the height requirement is viewed as gender discrimination, see *Satty* v. *Nashville Gas Co.*, 384 F. Supp. 765, 771 n. 1 (M.D. Tenn. 1973), appeal pending, — F.2d — (6th Cir. —), it must be sustained if it "bears a rational relationship to a [legitimate] state objective." *Reed* v. *Reed*, 404 U.S. 251, 254 (1971).[6] The Supreme Court, and this court, have recently upheld even explicit gender classifications. See, e.g., *Schlesinger* v. *Ballard*, 419 U.S. 498, 95 S.Ct. 572 (1975); *Kahn* v. *Shevin*, 416 U.S. 351, 94 S.Ct. 1734 (1974); *Robinson* v. *Board of Regents*, 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974). More importantly perhaps, the classifications the Supreme Court has found unconstitutional have been explicit gender classifications, where the members of the result-

School Dist., 501 F.2d 1264, 1268-70 (9th Cir. 1974); *Ashworth* v. *Eastern Airlines, Inc.*, 389 F. Supp. 59[illegible] (E.D. Va. 1975); *Schaefer* v. *Tannian*, 7 CCH Empl. Prac. Dec. ¶ 9404 (E.D. Mich. 1974); *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972).

[6] Although several lower federal courts have deemed gender-based classifications constitutionally "suspect" and, thereby, justifiable only by a compelling state interest, see, e.g., *Johnston* v. *Hodges*, 372 F. Supp. 1015, 1016-18 (E.D. Ky. 1974), *Stern* v. *Massachusetts Indemnity Life Ins. Co.*, 365 F. Supp. 433, 439-42 (E.D. Pa. 1973), see also *Monell* v. *Department of Social Services*, 357 F. Supp. 1051 (S.D.N.Y. 1972), other courts have refused to deem such classifications "suspect," thereby applying a greater or lesser demanding "rational relationship" test. See, e.g., *United States* v. *Baechler*, 509 F.2d 13 (4th Cir. 1974), *Green* v. *Waterford Bd. of Educ.*, 473 F.2d 629, 632-4 (2d Cir. 1973), *Edwards* v. *Schlesinger*, 377 F. Supp. 1091, 1094-96 (D.D.C. 1974), *Ritacco* v. *Norwin School Dist.*, 361 F. Supp. 930 (W.D. Pa. 1973). Still other courts have deemed such classifications subject to an arguably intermediate "close scrutiny" test. See, e.g., *Gilpin* v. *Kansas State High School Athletic Ass'n*, 377 F. Supp. 1233, 1238-40 (D. Kan. 1973). Most importantly, however, never has this court or a Supreme Court majority required a compelling state interest to justify such classifications.

ing classes have, by definition, only their gender in common. See, e.g., *Stanton* v. *Stanton*, — U.S. —, 95 S. Ct. 1373 (1975); *Weinberger* v. *Wiesenfeld*, — U.S. —, 95 S. Ct. 1225 (1975), *Taylor* v. *Louisiana*, 419 U.S. 522, 95 S. Ct. 692 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Reed* v. *Reed*, 404 U.S. 71 (1971). Like *Geduldig*, however, the members of the classes in *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 94 S. Ct. 791 (1974), aff'g 465 F.2d 1184 (6th Cir. 1972), had more (their pregnancies or lack thereof) in common than their genders, but the Supreme Court, instead of equal protection analysis, relied upon the "fundamental" choice to have a child to invalidate mandatory pre- and post-partum leaves. See 94 S. Ct. at 802 (Powell, J., concurring in result); Pregnancy Classifications, *supra*, at 454-55. The Court, however, found "no rational relationship" between the mandated leaves and "the valid state interest of preserving continuity of [educational] instruction." 94 S. Ct. at 798.

We think the district court erred in finding no "rational support" for the height requirement. If East Cleveland's height requirement lacks "rational support," so do height requirements elsewhere. Plaintiff's own exhibits demonstrate that forty-seven of forty-nine state highway patrols and police forces and twenty-nine of twenty-nine municipal police departments surveyed have, or at least then had, height requirements (ranging from five feet, six inches to six feet). See Note, Height Standards in Police Employment & the Question of Sex Discrimination: the Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII, 47 So. Calif. L. Rev. 585, 586-9 (1974) [hereinafter Height Standards]. That certain government entities, including the Wisconsin highway patrol, the Pennsylvania state police (2 CCH Empl. Prac. Guide ¶ 5177 [1973]) and the Law Enforcement Assistance Administration (33 Fed. Reg. 6415 [March 9, 1973]), no longer utilize or favor height requirements cannot rebutt the nearly universal use of height

requirements in hiring police. Such widespread use, of course, does not compel a finding of constitutionality, but "is plainly worth considering" in determining the "rationality" and constitutionality of height requirements. *Manning* v. *Rose*, 507 F.2d 889, 892 (6th Cir. 1974), quoting *Leland* v. *Oregon*, 343 U.S. 790, 798 (1952).

Moreover, at least three East Cleveland Police officials testified uncontradictedly and adamantly to the need for the height requirement. The chief of detectives, with twenty-six years' police experience, testified to the psychological advantage of a taller officer; a shift commander, with over seventeen years' experience, testified to the advantage of height in effecting arrests and emergency aid; and, the police chief testified similarly. Though plaintiff's expert witnesses discounted the importance of height and though the district court accepted that discounting, 363 F. Supp. at 1140-4, noteworthily, no expert had police experience.

The district court also discounted certain "functions claimed to be related to height and weight [because those functions] actually took only a small portion of the average patrolman's time and . . . [because] traffic-related matters accounted for more than three-quarters of the patrolman's working time." That an occupational function consumes a *de minimis* proportion of one's workday, however, does not necessarily diminish the need for selecting one who can best perform that function. A lifeguard may well spend all but fifteen minutes of an entire summer observing swimmers and keeping the beach free of litter, but in those fifteen minutes swimming ability to rescue a drowning swimmer becomes vitally crucial. See Height Standards, *supra*, at 611.

Even if plaintiff's experts were correct, and even if modern police practices discount the importance of height, there would still be "rational support" for the height requirement. The equal protection clause requires nothing greater than "rational support." As Mr. Justice Stewart has written,

> "[The Fourteenth Amendment no longer gives courts] power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' That era long ago passed into history." *Dandridge* v. *Williams*, 397 U.S. 471, 484-85 (1970) (citations omitted).

WEIGHT REQUIREMENT

East Cleveland Administrative Code § 123.07(c) authorizes the Director of Health to establish physical standards for police applicants. In their appellate brief, defendants admit that "[a]s a matter of custom, East Cleveland has followed certain weight 'guidelines' or 'ranges' to judge the fitness of an applicant." See 363 F. Supp. at 1136 n.3. The 150-pound minimum weight requirement disqualifies approximately 80% of the women, but only 26% of the men, meeting the height requirement.[7]

Despite a thorough review of the record, we can find no rational support for the weight requirement.[8] Defendants' brief asserts that the weight requirement was designed "to judge the fitness of an applicant." But plaintiff's expert witness uncontradictedly testified that weight, in itself, is, at best, a poor predictor of fitness; he testified that body composition — the relationship between muscle and body fat — is much better, and that body composition can be determined quite simply. Moreover, the weight requirement is neither rationally

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[7] The height requirement disqualifies approximately 95 per cent of the women. The weight requirement disqualifies an additional four per cent. Thus, it disqualifies 80 per cent of the women meeting the height requirement. The height requirement disqualifies approximately 45 per cent of the men. The weight requirement disqualifies an additional 14 per cent, or just over 26 per cent of the men meeting the height requirement.

[8] Neither can we find indirect "rational support" for the weight, unlike the height, requirement in widespread use of such weight requirements. The record is silent concerning whether such weight requirements are near-universal, widespread, or even unique to East Cleveland.

related to physical strength nor to psychological advantage. East Cleveland utilizes other tests[9] to determine strength, and plaintiff's expert denied a correlation between strength and weight. Most of the police officials' testimony concerning psychological advantage was confined to height, and in any event a police officer's clothing would make it difficult for the potential police assaulter to differentiate closely concerning a police officer's weight. The assaulter could hardly tell whether a fully clothed police officer weighs 145, or 155, pounds, even assuming that if he could such knowledge would be relevant in his decision as to whether to assault an officer or not.

AGCT – RACE

Defendants claim that the district court erred in invalidating the AGCT for its racially disparate impact because the "total examination process" has no such impact. Defendants claim that the difference between the 33% of black applicants and the 29% of black police hires (seven of twenty-four from 1969-73) is insufficient to require defendants to justify the AGCT as job-related. Even if defendants had the burden of justifying the AGCT, they argue that the use of the test would be permissible as being job-related.

Without reaching the question of the AGCT's job-relatedness, or lack thereof, we hold that plaintiff has failed to demonstrate prima facie that the test is unlawfully discriminatory. Though general ability, or intelligence, tests have often been invalidated for their racially disproportionate impacts, see, e.g., *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973), *Walston* v. *County School Bd.*, 492 F.2d 919 (4th Cir. 1974), *Baker* v. *Columbus Municipal Separate School Dist.*, 462 F.2d 1112 (5th Cir. 1972), *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972), *Davis* v. *Washington*,

[9] The athletic, or physical fitness, test consists of kneebends, push-ups, sit-ups, and side-hops.

512 F.2d 956 (D.C. Cir. 1975), the disproportionate impacts have been in the hiring, rather than in the test results in and of themselves. See, e.g., *Davis, supra*, at 961 n. 32 (blacks 72% of applicants taking test, but only 55% of new police officers); *Vulcan Society* v. *Civil Serv. Comm'n*, 490 F.2d 387, 392 (2d Cir. 1973) (blacks and Hispanics 11.5% of applicants, but less than 5% of those with more than "a marginal chance" of appointment); *Arnold* v. *Ballard*, 9 CCH Empl. Prac. Dec. ¶ 9921 (N.D. Ohio, 1975) (blacks more than 13% of applicants, but less than 4% of appointed officers); *Kirkland* v. *New York State Dep't of Correctional Services*, 374 F. Supp. 1361 (S.D.N.Y. 1974) (blacks and Hispanics 8.1% of those taking test, but only 1.3% of those "likely to be" promoted); *Commonwealth* v. *O'Neill*, 348 F. Supp. 1084, 1087-89 (E.D. Pa. 1972), modified, 473 F.2d 1029 (3rd Cir. 1973) (blacks approximately 35% of applicants, but only 27.5%, 25.3%, 15.3%, 11.2%, and 7.7% of new police hires from 1966-70).

The Second Circuit has observed that,

> "[w]here the plaintiffs have established that the disparity between the *hiring* of Whites and minorities is of sufficient magnitude, then there is a heavy burden on the defendant to establish that the examination creating the discrimination bears a demonstrable relationship to successful performance of the jobs for which they were used . . . ." *Bridgeport Guardians, supra*, 482 F.2d at 1337.

Similarly, *Kirkland, supra*, rejected defendants' attempt to fragment the examination process to show no racially disparate impact.

> "Any . . . approach [other than scrutinizing the overall examination procedure] conflicts with the dictates of common sense. Achieving at least a passing score on the examination in its entirety determines eligibility for appointment, regardless of performance on individual sub-tests. Accordingly, plaintiffs' case stands or falls on comparative pass rates alone." 374 F. Supp. at 1370.

That blacks fare less well than whites on the AGCT, a "subtest" in the process of hiring East Cleveland police officers, is insufficient in itself to require defendants to justify the AGCT as being job-related. Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a "subtest" of the "subtest."

AGCT-SEX

Plaintiff cross-appeals that the district court erred in refusing to find that she had established prima facie that the AGCT unconstitutionally discriminates against women. We hold that the district court properly refused to find prima facie discrimination because of the only two women who have taken the AGCT in applying for the East Cleveland police one fared better than the national norm, one lower; and because testing and psychological data, though perhaps forecasting that women will fare less well on the AGCT than men, is far from being "uncontroverted testimony" that women will fare less well. *Boston Chapter, NAACP* v. *Beecher,* 504 F.2d 1017, 1021 (1st Cir.), *aff'g* 371 F. Supp. 507 (D. Mass. 1974); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Serv. Comm'n,* 482 F.2d 1333, 1338-39 (2d Cir. 1973); *Castro* v. *Beecher,* 459 F.2d 725, 734 (1st Cir. 1972); *Officers for Justice* v. *Civil Serv. Comm'n,* 371 F. Supp. 1328, 1333-34 (N.D. Cal. 1973). Rather than being "uncontroverted" that women will fare less well, defendants' expert testified that black women will fare better than black men on "test[s] of aptitude, intellectual aptitude."

ATTORNEY'S FEES

Especially considering our view of the merits, we find no abuse of discretion in the district court's denial of attorney's fees.

Reversed in part; affirmed in part.

A-71
Opinion of Court of Appeals Denying Motion for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELIZABETH A. SMITH, On behalf of herself and all others similarly situated

Plaintiff-Appellee

v.

ROBERT TROYAN, REGINALD GOWER, JAMES RITCHIE and JAMES BARRETT

Defendants-Appellants

ELIZABETH A. SMITH, On behalf of herself and all others similarly situated

Plaintiff-Cross-Appellant

v.

CITY OF EAST CLEVELAND, ET AL.

Defendant-Cross-Appellees

Before: WEICK, CELEBREZZE and PECK, Circuit Judges.

Opinion of Court of Appeals Denying Motion for Rehearing

Plaintiff-appellee's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

(signed) John P. Hehman
Clerk

Filed: August 21, 1975

CERTIFICATE OF SERVICE

Three copies each of the Petition for a Writ of Certiorari and Appendix have been hand-delivered this th day of November, 1975, to Charles T. Riehl, Esq., 1215 Terminal Tower, Cleveland, Ohio 44113 and Henry B. Fischer, Esq., Williamson Building, Cleveland, Ohio 44113, Attorneys for Defendants-Respondents.

Jane M. Picker
Attorney for Petitioner

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-734

ELIZABETH A. SMITH, ET AL.,

Petitioners

vs.

ROBERT TROYAN, ET AL.,

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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RESPONDENTS BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is reported at 520 F.2d 492, and is contained in Petitioner's Appendix at page A-59.

The opinion of the District Court for the Northern District of Ohio, Eastern Division, is reported at 363 F. Supp. 1131 (N.D.Ohio 1973) and is

contained in Petitioner's Appendix at page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1975. (A-59). A Petition for Rehearing was denied on August 21, 1975. (A-71). The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Is a legislatively established classification based on height for eligibility to be a police officer, which classification has an exclusionary impact on both males and females (although females to a somewhat greater degree), a classification based on a constituionally "suspect" category or a classification which impinges upon a constitutionally "fundamental" right which requires strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment?

2. If a social policy is to be undertaken, viz., lowering height requirements to broaden employment oppor-

tunities in police departments for both males and females, should the legislative branch of government decide whether to undertake the policy and set the limits of lowering the height requirement, or should the judicial branch under an interpretation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution set the policy and completely abolish any height requirements?

3. Is the Due Process Clause to the Fourteenth Amendment of the United States Constitution offended when the legislative branch of Government establishes a fixed height standard for applicant eligibility as a candidate to a police department?

4. Does the petitioner, who has been found not to satisfy the constitutionally valid height requirement for eligible applicants to the East Cleveland Police Department, still have standing to challenge the validity of the written examination?

5. Did the petitioner make out a prima facie case of racial discrimination in the hiring process for police officers in East Cleveland Police Department?

6. Assuming, arguendo, that a prima facie case of racial discrimination has been shown in East Cleveland's police officers' entrance standards,

is the East Cleveland written examination sufficiently job related to be upheld?

CONSTITUTIONAL PROVISION INVOLVED

U.S.Const. Amend.XIV. Sec. 1

> . . . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action was commenced by a single plaintiff on March 23, 1973, the day before the City of East Cleveland was scheduled to conduct examinations to fill six vacancies in a police department which has an authorized strength of 71 Civil Service positions. The petitioner named as defendants the City of East Cleveland; Curtiss C. Hall, the City's black, male, city manager; Robert Troyan, the City's white, male, police chief; Mae E. Stewart, a black female City Commissioner; Reginald Raines, a black male City Commissioner; James W. G. Watson, a white, male, City Commissioner; Charles E. Moseley, a black, male,

City Commissioner; Jane B. Young, a white, female, City Commissioner; Reginald Gower, a white, male Civil Service Commissioner; James Richey, a black, male Civil Service Commissioner; and certain "federal defendants" including the Administrator and Regional Director of the Law Enforcement Assistant Administration.

The City's Civil Service entrance examination consists of (a) a written test, (b) an athletic test, (c) a physical examination conducted by the Director of Health, a physician, which includes a height measurement and (d) an oral interview and background investigation. Because of the District Court's injunction, the petitioner was allowed to take the written test and athletic test despite the fact that she did not meet the requirements of East Cleveland Administrative Code §123.07(d) which requires police applicants to be at least 5'8" in height. The petitioner failed to score sufficiently high on the written examination to qualify with other eligible applicants for the oral interview and background investigation; and, accordingly, in the instant suit she amended her Complaint to challenge not only the City's height requirement but also its reliance on the written examination.

The evidence at the non-jury trial, which commenced on May 15,1973, established that East Cleveland is a suburb

of, and physically adjoins the City of Cleveland. The physical area of the City contains some 3.5 square miles of land in which reside approximately 39,600 people, giving East Cleveland one of the highest population densities of any municipal corporation in Ohio. There has been a significant transition in the population characteristics of the City during the past 10 years. For example, in 1965 the City was approximately 10% black with an all white police force. Some 8 years later, in 1973, the City had an approximately 60% black population with a police force of 9 blacks out of a total authorized strength of 71 or 12.7%. At the time this matter was heard by the Court of Appeals, in part because of the injunctions of the District Court, there were 8 vacancies on the police force and the 9 black officers comprised 14.3% of the total force.

During the course of the years there have only been two female applicants for police officer position. The first, Gloria Webb, met the height requirements and fully completed taking the entrance examination. The other, the petitioner, was disqualified upon her initial application because she did not meet the height requirement.

At trial, the City presented extensive and varied testimony concerning the validity of the height requirement. Police officers from

the City Police Department, all with extensive experience, testified as to the psychological advantage of a taller officer, and the advantage of height in effecting arrests and rendering emergency aid. In a representative sample of 3895 East Cleveland arrestees the average height of all arrestees was 5'9" and over 85% of the arrestees were males. Further evidence was introduced as to the widespread usage of height minimums by various state and local police departments throughout the country.

The evidence further established that in recent years, the City Manager, (who is black) the three Civil Service Commissioners (of whom two of three are black) and the five City Commissioners (of whom three of five are black) have entered into an extensive recruiting program to obtain qualified blacks on their police force. This recruiting program has been successful since during the years 1969-72 of the 549 persons applying for the position of police officer in the City, 33 percent were black; and of the officers eventually hired during this period, 29 percent were black (7 of 24).

During the 1973 examination process of the black applicants, 75 percent were veterans or had military experience while 63.5 percent of the white applicants were not veterans. Concerning their educational background, however, it appeared that 65

percent of the white applicants had some college background while 35 percent of the black applicants had some college background. This educational differentiation was explained by a Civil Service Commissioner to have occurred because the white applicants were more oriented toward career police work with a law enforcement background, while many of the blacks, because of the City's extensive minority recruiting program, were merely attempting to obtain a job and were not career oriented police candidates.

The written examination was only one portion of the City's total hiring process, accounting for approximately 56 percent of the total possible points. While the Civil Service Commissioners were aware of the minority recruiting problems experienced by other cities through the use of their written examinations, the Civil Service Commissioners determined to retain the use of the written examination because the test gave the City the caliber of police officers it needs and, with more recruiting, the City expects to get more highly educated blacks to take the examination. The predictive nature of the written examination was, in part, established by a high correlation coefficient between success on the test and success in the mandatory Ohio police officers training course which all East Cleveland police officer appointees

attend immediately upon their appointment; with efficiency service ratings applied to East Cleveland patrol officers by their superior officers; and with success on the sergeant's promotional examination. Further, the Chief of Police uncontradictedly testified that the sergeant's examination was related to measuring proficiency in various job functions of East Cleveland Police Department.

REASONS FOR DENYING CERTIORARI

1. The Due Process Clause of the Fourteenth Amendment is Inapplicable to the Instant Case.

Petitioner argues that the minimum height requirement imposed by East Cleveland Administrative Code §123.07(b) amounts to a conclusive presumption which is neither necessarily or universally true and is alleged to be in violation of the Due Process Clause of the Fourteenth Amendment. Respondents contend that there has been no violation of the Due Process Clause since petitioner has not been deprived of a constitutionally recognized right of "life, liberty or property" nor are reasonable, legislatively enacted entrance standards "irrebutable presumptions" in violation of the Due Process Clause.

A. There has been no deprivation of "life, liberty or property."

Unlike the working women in Cleveland Board of Education v.LaFleur, 414 U.S. 632 (1974), the petitioner in the instant matter does not have a job with East Cleveland but is merely an applicant for a governmental job. Thus, apart from the issue of an "irrebutable presumption" in the City's height standard, the petitioner has not been deprived of a constitutionally recognized right of "life, liberty or property" which deserves Due Process protection. Roth v. Board of Regents, 408 U.S. 564, 569 (1972). Obviously, the petitioner has not been deprived of life, and we doubt very seriously whether the occupation of a police officer falls within the definition of "the common occupations of the community" alluded to in Truax v. Raich, 239 U.S. 33, 41 (1915) wherein a cook was sought to be deprived of his job. East Cleveland's concern in this matter goes beyond merely providing employment opportunities in its Police Department but extends to protecting the lives and property of its citizens. More appropriately, the petitioner might claim that she is deprived of a property right recognized by the Constitution. However, it has been repeatedly held in this court as well as other courts that there is no constitutionally protected right to governmental employment as such. Roth v. Board of Regents,supra;

Bailey v. Richardson, 182 F. 2d 46 (D.C. Cir.1950) aff'd. 341 U.S. 918 (1951); Orr v. Trinter, 444 F. 2d 128 (6th Cir.1971). See also Weisbrod v. Lynn, 383 F. Supp. 933 (D.C.Cir. 1974) (3-judge court) aff'd. _____U.S., 43 L. Ed. 2d 420 (Feb.24,1975) (dismissed for want of substantial federal question Due Process challenge to U.S. Government mandatory retirement age of 70), McIlvane v. Pennsylvania, 309 A. 2d 801 (Pa.1973), dism'd. for want of subst. Fed. question _____U.S._____ 7 FEP Cases 586 (1974) (Pennsylvania State Police Mandatory Retirement Age of 60 constitutional); Cannon v. Guste, _____F. Supp._____ 11 FEP Cases 675 (E.D. La. May 5,1975) (3-Judge Court), aff'd mem. _____U.S._____ 11 FEP Cases 715 (Nov. 3,1975) (Louisiana Mandatory 65 age retirement for Civil Service employees constitutional). As stated by this Court in Board of Regents v. Roth, supra at 577:

> "To merit due process protection, a person must have more than an 'abstract desire' or even a compelling personal need for the interest in question; he must be able to establish a 'legitimate claim of entitlement to it.'"

Accordingly, petitioner has not been deprived of an interest encompassed by the Fourteenth Amendment protection of liberty and property.

B. It is constitutionally permissible for a legislature to set entrance standards.

The mere fact that East Cleveland has set standards in its legislation does not call for a violation of the Due Process Clause. While respondents believe the height standards are reasonable and justifiable, it should be of no concern to the Court that the legislative body of East Cleveland has drawn a particular classification which may be less than perfect, Dandridge v. Williams, 397 U.S. 471, 485 (1970), or that the classification chosen by the City attacks only one aspect of the particular problem and not another. Williamson v. Lee Optical Co., 348 U.S. 483 (1954).

To challenge legislation on the grounds that it creates an "irrebutable presumption" does no more, in reality, than challenge the concept of a legislature as a line drawing body. Obviously, when local legislation setting standards is called in to question a great many people may have various reasonable ideas of what standards are appropriate. However, merely because there may be a good many "talking points" against the standards set forth in the legislation does not give a court authority to declare the legislation unconstitutional. Although arising in a different factual setting, this Court in Village of

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) set forth the proper test when the standards of local legislation are challenged:

> "Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves . . . .. The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view

> was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinances in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.'"
> 272 U.S. 365, 388-89. (1926) (Citations omitted).

Based on the foregoing, we submit the standards of the East Cleveland legislation do not violate the Due Process Clause of the Fourteenth Amendment.

2. Petitioner's Equal Protection Clause Sex Discrimination Claims

A. Since this case was brought solely as an Equal Protection Clause case, it would be inappropriate at this stage of the proceedings to consider whether Title VII standards should apply.

This case was brought solely as an Equal Protection Clause case pursuant to 42 U.S.C.§1983. The Respondents

defended themselves solely upon their analysis of the constitutional standards required by the Equal Protection Clause, and the facts in the record have been weighed by the District Court and Court of Appeals solely upon the constitutional standard. It therefore seems totally inconsistent at this stage of the proceedings to attempt to interject a new standard, the legislative standard of Title VII, 42 U.S.C. §2000e et. seq. and to weigh whether the Respondents' actions (based on facts in their defense to an Equal Protection Clause claim) violate those standards.

Assuming, arguendo, that this issue may now be raised, the recent case of Geduldig v. Aiello, 417 U.S. 484 (1974) provides ample precedent that the legislative standards of Title VII should not be transposed to the Equal Protection Clause. Geduldig upheld the constitutionality under equal protection challenges of a pregnancy exclusion clause from coverage of the California Disability Insurance System that pays benefits to persons in private employment who are temporarily unable to work because of a disability and not covered by Workmen's Compensation, despite the fact that the Equal Employment Opportunity Commission had issued a guideline under Title VII which would have

prohibited such a policy. Further, some months after Geduldig the issue of pregnancy exclusion from temporary disability benefits was relitigated in a California Federal Court, this time under Title VII, and such an exclusion was found unlawful. Vineyard v. Hollister School District, 64 F.R.D. 580 (N.D. Cal. 1974).

Although we believe the Respondents' policies are in compliance with Title VII, we do recognize that Congress in its legislative powers may perhaps regulate an area more broadly than the judiciary would interpret the Equal Protection Clause. See Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966). See also Monaghan, The Supreme Court, 1974 Term, Forward: Constitutional Common Law, 89 Harv. L. Rev. 1,26-30 (1975). Thus, Respondents do not believe it necessary to examine the issue of whether Title VII liability is present in this case.

B. The Court of Appeals applied the proper Equal Protection Clause standard.

In examining the Respondents' height requirement under the traditional "rational relationship" standard, the Court of Appeals for the Sixth Circuit considered the fact that the height requirement had an exclusionary impact on both males and females, although females to a somewhat greater degree. As such, the Respondents' policies

did not create a classification which was gender-based as such. Moreover, even if the Respondents' height requirement policy would be construed to be a gender related classification, the Court of Appeals would have been justified in relying upon a long line of cases which have declined to subject such legislative classifications to "close" judicial scrutiny. See Schlesinger v. Ballard, 419 U.S.498 (1975); Geduldig v. Aiello, 417 U.S. 484, (1974); Kahn v. Shevin, 416 U.S. 351 (1974); Reed v. Reed, 401 U.S. 71 (1971); Williams v. McNair, 401 U.S. 951 (1971) aff'g. 316 F. Supp. 134 (D.S.C. 1971) (3-Judge Court); Hoyt v. Florida, 368 U.S.57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Radice v. New York, 264 U.S. 292 (1924); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Mueller v. Oregon, 208 U.S. 412 (1908).

Recent possible exceptions to this long line of cases are the plurality decision in Fronterio v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975), and Taylor v. Louisiana, 419 U.S. 522 (1975). While these cases invalidated explicit sex-based classifications under a "heightened" judicial examination, they all involved two factors which are not present in this case; namely, the classification was based explicitedly on sex, and the sex-based classification was justified solely upon administrative convenience grounds. Since the classification in the instant case is not

explicitedly gender-based and since the height standard was developed upon the good faith legislative finding that it assisted the police officers in the performance of their duties, the Court of Appeals correctly applied the more traditional Equal Protection Clause standard to the essentially undisputed facts in this case.

3. Petitioner's Equal Protection Clause Racial Discrimination Claims

After the petitioner was granted injunction by the District Court to take the City's examination battery and after she performed poorly on the written examination, she was granted leave to amend her Complaint to challenge the written examination on the grounds that it unconstitutionally discriminated against her on the basis of her race and sex. At the Court of Appeals level, the Respondents challenged her standing to raise these issues once the height requirement was found to be valid since she had not met the conditions precedent of being a qualified applicant eligible to take the written examination. Ex parte Levitt, 302 U.S. 633 (1937); McDonald Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Smiley v. The City of Montgomery, 350 F. Supp. 451 (N.D. Ala.1972); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga.1968), aff'd. 393 U.S. 266 (1968); see also Laird v. Tatum, 408 U.S. 1 (1972). The Court of Appeals for the Sixth Circuit found it unnecessary to consider this issue; but,

rather, proceeded to examine the petitioner's racial discrimination claim and found that the petitioner had failed to establish a prima facie case of racial discrimination in the municipality's total hiring process.

Petitioner's position concerning racial discrimination appears to present a proposition without legal precedent. She argues that because a certain group of blacks do not do as well as a certain group of whites, regardless of their educational background, on one particular segment of a written examination (e.g., verbal portion of the Army General Classification Test), a prima facie case of racial discrimination in hiring is thereby proven. The cases cited by petitioner at pages 23-24 of her brief do not support her position on this issue since in all of these cases the racially disproportionate impact upon minorities in the pass or fail rate of a written examination carried through to a disproportionate impact on minorities in the total hiring process.

In the instant case however, no disproportionate impact on minorities in the total hiring process was proven, and, accordingly, no prima facie case of racial discrimination was established. See e.g., Developments in the Law - Employment Discrimination, 84 Harv. L. Rev. 1109, 1118 (1971). Carried to its logical extreme, the petitioner's theory concerning the fragmentation of a written examination would allow any dis-

gruntled minority candidate to challenge the constitutionality of a total hiring process (which hired a proportionate number of a minority class based on the applicant pool) on the grounds that minorities had a disproportionately high failure rate on a particular question. Respondents would disagree with this proposition and would state that a plaintiff must show that the standard in question (e.g., the total examination process) has a differential impact on a protected minority group in order to prove a prima facie case. Further, the plaintiff must show the differential impact on the minority class in hiring by substantial and meaningful statistics. Without such a showing, the hiring employer should be able to continue to use the standard in question whether it is the "best" standard in terms of job-relatedness or not.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

/s/ Paul W. Walter
Paul W. Walter

/s/ Charles T. Riehl
Charles T. Riehl

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Counsel for Respondents

Of Counsel

HENRY B. FISCHER
Law Director
City of East Cleveland

JAMES P. MANCINO
Asst. Law Director
City of East Cleveland

CERTIFICATE OF SERVICE

Three (3) copies of the Brief of Respondents in Opposition were deposited in the regular U.S. mail, postage prepaid, on the 15th day of December, 1975, addressed to Jane M. Picker, 620 Keith Building, 1621 Euclid Avenue, Cleveland, Ohio 44115, attorneys for the plaintiff-petitioner.

/s/ Paul W. Walter
Paul W. Walter
Attorney for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-734

ELIZABETH A. SMITH, et al.,

Petitioners,

vs.

ROBERT TROYAN, et al.,

Respondents,

SUPPLEMENTAL BRIEF AND APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-734

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v.

ROBERT TROYAN, et al.,

Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF AND APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

This Supplemental Brief and Appendix is being filed pursuant to Rule 24(5) of the Rules of this Court.

On March 23, 1976, this Court rendered its decision in Liberty Mutual Insurance Company v. Wetzel, ____ U.S. ____, 96 S. Ct. 1202 (1976), ruling that the District Court's order in that case was not appealable, and vacating the judgment of the United States Court of Appeals for the Third Circuit with instructions to dismiss the appeal. Because this recent decision is relevant to issues present in their petition filed in this Court on November 18, 1975, Petitioners now file this Supplemental Brief and Appendix. 1/

SUPPLEMENTAL STATEMENT OF THE CASE

On September 6, 1973, United States District Judge Thomas Lambros entered a memorandum opinion and order in Elizabeth A. Smith, et al. v. City of East Cleveland, et al., 363 F. Supp. 1131 (N.D. Ohio 1973) (A-1 -- A-58). In its opinion the District Court declared certain employment practices of the Defendants to be unlawfully discriminatory. The District Court deferred any decision on the Plaintiffs' request for injunctive relief choosing only to continue the interim relief already in effect. The Defendants were directed to submit a proposed plan for the implementation of the

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1/ References to material appearing in the Appendix to the Petition for Certiorari are preceded by the initial "A". References to material appearing in the Supplemental Appendix attached to this Brief are preceded by the initial "B".

Court's ruling to which Plaintiffs would respond. A hearing to discuss final relief was scheduled for October 12, 1973. (A-58). The parties filed their individual plans in compliance with the Court's order in late September. On October 2, 1973, the District Court, recognizing the problems inherent in securing a police entrance examination which would not discriminate on the basis of race, requested counsel in The Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio 1973) (a case raising, inter alia, questions of race discrimination in police hiring and promotion) to appear as amicus curiae at the conference on relief. (B-1, B-2).

On October 3, 1973, prior to the conference, the Defendants filed their notice of appeal, purporting to appeal from "the final judgment entered . . . on the 6th day of September 1973." (B-3). [2] Defendants did not move for certification of that memorandum opinion and order pursuant to Title 28 U.S.C. §1292(b). [3] No separate document or

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[2] Although Plaintiffs filed a protective notice of appeal on October 17, 1973, they expressly reserved their right to challenge the timeliness of Defendants' appeal. (B-4, B-5).

[3] On October 24, 1973, the District Court, being "of the opinion that the memorandum opinion and order of September 6, 1973, involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially

judgment relative to the September 6, 1973, order was ever entered by the Court. (B-7, B-11, B-18, B-22).

In response to Defendants' notice of appeal, Plaintiffs, on October 23, 1973, moved to dismiss the appeal. The Court of Appeals, in denying Plaintiffs' motion concluded that "to the extent the Memorandum Opinion and Order issued by the District Court on September 6, 1973, is not a final judgment, but is an interlocutory order granting injunctive relief, the same is appealable under 28 USC § 1292(a)(1)." B-9).

In late May, 1974, prior to oral argument in the Court of Appeals, Plaintiffs learned that the Defendants intended to administer a police entrance examination and to hire police officers without seeking or obtaining the District Court's approval of the examination, eligibility restrictions and other procedures. Plaintiffs sought to hold the

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Footnote 3 continued

advance the ultimate termination of the litigation," certified the matter sua sponte, nunc pro tunc. The District Court also stayed any further proceedings until a decision by the Court of Appeals. (B-7). Because the Defendants never applied to the Court of Appeals for leave to appeal, jurisdiction pursuant to Title 28 USC § 1292(b) was never perfected. Liberty Mutual Insurance Company v. Wetzel, 96 S. Ct. at 1207.

Defendants in contempt for violation of the District Court's order of September 6, 1973. In ruling on the contempt motion, the District Court clarified that order:

> "Although the Court clearly indicated its intention to grant certain injunctive relief consistent with its findings of fact and the declaratory relief offered, such injunctive relief was not granted in the Order. The Court stated that it would enjoin certain activities in an effort to apprise the parties of the direction of the Court so that they might take such intended court action into account in drawing up their respective proposals for an acceptable testing and hiring program. No relief other than declaratory relief was granted." (B-13)

Thus, because there was no specific order barring the Defendants' unilateral development and implementation of a new hiring program, the Court did not hold the Defendants in contempt at that time, but instead scheduled a hearing to consider Plaintiffs' motion to hold Defendants in contempt of the interim relief and to proceed with the fashioning of final relief. (B-16, B-18). 4/

4/ The stay, previously entered by the Court, was vacated by the Order of June 26, 1974. See note 3, supra.

Prior to this hearing, Defendants sought to terminate the proceedings in the District Court on the grounds that the Court lacked jurisdiction. Consequently, on July 18, 1974, the District Court issued another order concerning the status of the case. At this time the Court determined that "it would be unseemly to proceed with further consideration or to take further action relative to the shaping of final relief at this time," B-20) in light of the action of the Court of Appeals. 5/ The District Court then deferred the fashioning of final relief, leaving in effect the interim relief previously granted by the Court.

The Plaintiffs next attempted unsuccessfully to have the Court of Appeals reconsider its April 4, 1974, order. (B-28).

ARGUMENT

The facts of this case are strikingly similar

5/ Although the District Court was aware that the Court of Appeals had recognized the appeal, the District Court was not certain "whether the Court of Appeals Order of April 4, 1974 refers to the interim relief only as the subject of appeal under 28 USC § 1292(a)(1), or whether the Court has interpreted this Court's statement of intent to issue other final injunctive relief based on its September 6th findings as an interlocutory decree from which an appeal would be proper under 28 USC §1292(a)(1)." (B-24 n. 2).

to those present in Liberty Mutual Insurance Company v. Wetzel, supra. In Smith, as in Liberty Mutual, the Plaintiffs received a favorable ruling on the issue of Defendants' liability. However, with the exception of a declaratory judgment, none of the relief sought by Plaintiffs was granted. While Plaintiffs' request for attorneys' fees was denied, their prayers for injunctive relief, back pay, costs and affirmative relief were left unresolved. The District Court's order of September 6, 1973, thus was not appealable as a final order pursuant to 28 U.S.C. § 1291. Liberty Mutual Insurance Company v. Wetzel, 96 S. Ct. at 1206.

Similarly, the District Court's order was not appealable pursuant to 28 U.S.C. § 1292(a)(1) since the Court issued no injunction. The District Court, both before and after the notice of appeal was filed by the Defendants consistently recognized that only declaratory relief had been awarded. (A-57, B-1, B-6, B-11, B-13, B-18, B-22, B-24 n. 2, B-26).

The procedure followed by the Defendants herein is the practice expressly rejected in Liberty Mutual. Unlike the District Court in Liberty Mutual, which attempted, albeit unsuccessfully, to expedite an appeal, the District Court in Smith, continually insisted that it had not yet entered any order that could be appealed. As this Court pointed out in Liberty Mutual, were it to sustain the procedure followed by the District Court there, it:

> "would condone a practice whereby a district court in virtually any case before it might render an interlocutory decision on the question of liability of the defendant, and the defendant would thereupon be permitted to appeal to the Court of Appeals without satisfying any of the requirements that Congress set forth." 96 S. Ct. at 1207.

The Court further noted that it:

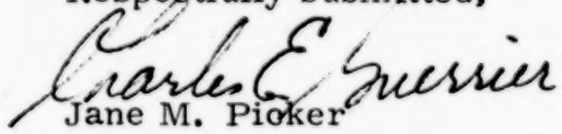
> "would twist the fabric of the statute more than it will bear if we were to agree that the District Court's order . . . was appealable to the Court of Appeals." 96 S. Ct. at 1207.

If the procedure utilized in Liberty Mutual Insurance Company, supra, is a "twist[ing of] the fabric of the statute", the procedure utilized in Smith has rent it. The decision of the United States Court of Appeals for the Sixth Circuit can be no more valid than was the decision of the Third Circuit. It therefore should be vacated with instructions to dismiss the appeal of the Defendants.

CONCLUSION

For these additional reasons, Petitioners pray that this Court grant their petition for a writ of certiorari.

Respectfully submitted,



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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed Oct. 2, 1973)

ELIZABETH A. SMITH,

Plaintiff,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

On September 6, 1973, the Court entered a memorandum opinion and order which declared certain employment practices of the East Cleveland Police Department to be unlawfully discriminatory. The Court deferred decision on plaintiffs' requests for injunctive relief and requested defendants to propose appropriate programs to implement the Court's rulings. A conference to discuss the proposed relief and any objections which may be inter-

posed by plaintiffs thereto will be held on Tuesday, October 9, 1973, at 11:00 a.m.

Having taken judicial notice that the question of securing an examination for police applicants which does not discriminate on the basis of race has arisen in another case in this District, The Shield Club v. City of Cleveland, C72-1088, the Court has requested counsel in that suit, R. Edward Stege and Malcolm Douglas, to appear as amicae curiae at the conference.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: 10/2/73

B-3
Notice of Appeal

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed Oct. 3, 1973)

ELIZABETH A. SMITH, et al.,

Plaintiffs,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

Notice is hereby given that Defendants Robert Troyan, Reginald Gower, James Ritchie, and James Barrett, in their official capacity hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this action on the 6th day of September, 1973.

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B-4
Notice of Cross Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C 73-299

(Filed Oct. 17, 1973)

ELIZABETH A. SMITH,

Plaintiff,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

Notice is hereby given that Plaintiff Elizabeth A. Smith, on behalf of herself and all others similarly situated, hereby cross-appeals the issue of whether the Army General Classification Test discriminates on the basis of sex and the failure to grant attorneys' fees to the United States Court of Appeals for the Sixth Circuit from the Memorandum and Order entered in this action on the 6th day of September, 1973.

This cross appeal is intended to protect the

interests of the Plaintiff and the class which she represents. This cross appeal should not be construed as an admission by Plaintiff that said appeal by Defendants, Robert Troyan, Reginald Gower, James Ritchie and James Barrett, in their official capacities, is timely filed and is not intended by Plaintiff to be a waiver of any rights to oppose Defendants' appeal as untimely.

Respectfully submitted,

Rita Page Reuss

Jane M. Picker

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed Oct. 24, 1973)

ELIZABETH A. SMITH,

Plaintiff,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

On September 6, 1973, the Court entered a memorandum opinion and order which declared certain employment practices of the East Cleveland Police Department to be unlawfully discriminatory. The Court deferred ruling on plaintiffs' requests for injunctive relief and requested defendants to propose appropriate programs to implement the Court's rulings.

On October 3, 1973, defendants filed a

notice of appeal. They did not move for a certification of that memorandum opinion and order pursuant to 28 U.S.C. §1292(b) and no final judgment had been entered in the case.

Notwithstanding defendants' failure to request certification, the Court is of the opinion that the memorandum opinion and order of September 6, 1973, involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Court will therefore certify this matter sua sponte pursuant to 28 U.S.C. §1292(b) and, in order to prevent further delay in the appeal, will order such certification entered nunc pro tunc as of October 2, 1973.

It is further ordered that all proceedings in this case shall be stayed pending a determination by the Court of Appeals and that the interim relief previously provided shall continue in effect.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: October 24, 1973

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 73-2226 and 2227

(Filed Apr. 4, 1974)

ELIZABETH A. SMITH, et al.,

Plaintiff-Appellees

v.

CITY OF EAST CLEVELAND, et al.,

Defendants-Appellants

Before: WEICK, EDWARDS, ENGEL,
Circuit Judges

This case having been assigned by the Chief Judge to this panel pursuant to Rule 3(e) of the Rules of the Sixth Circuit for the purpose of ruling upon a motion of Plaintiff-Appellee to dismiss the appeal herein because the judgment appealed from is not a final judgment and because this court is without jurisdiction to entertain the appeal under 28 U.S.C. §1292(a) for failure of the appellant to apply to this court for leave to appeal within ten days after entry of the order appealed from;

B-9
Order of the Court of Appeals

It appearing to the court that to the extent the Memorandum Opinion and Order issued by the District Court on September 6, 1973 is not a final judgment, but is an interlocutory order granting injunctive relief, the same is appealable under 28 U.S.C. §1292(a)(1),

IT IS ORDERED that the motion to dismiss is denied, but without prejudice to raise such issues before the panel to whom the appeal is assigned for decision on the merits.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk

B-10
Memorandum Opinion and Order
of the District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed June 26, 1974)

ELIZABETH A. SMITH, et al.,

Plaintiffs,

v.

THE CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

On September 6, 1973, after a lengthy trial to the Court on the claims presented by the plaintiff on behalf of herself and all other similarly situated, this Court issued a Memorandum Opinion and Order. In that Order, which is reported at 363 F. Supp. 1131, the Court set forth its findings of fact with regard to plaintiffs' claim that practices and restrictions of defendants in hiring police officers in East Cleveland, Ohio, denied blacks and women their

equal protection under the law in violation of 42 U.S.C. §1983 and the Fourteenth Amendment to the Constitution. Although the Court granted certain declaratory relief sought by the plaintiffs in this regard, the Court deferred entry of final injunctive and affirmative relief to be afforded plaintiffs in an effort to provide the defendants, as well as the plaintiffs, an opportunity to submit a proposed plan for the implementation of the Court's rulings. In view of the complexities involved in the development of an affirmative action plan, the Court ordered the defendants to submit its proposal within twenty (20) days of the Court's Order, instructed the plaintiffs to respond within ten (10) days thereafter, and scheduled a hearing to discuss final relief for October 12, 1973. The parties complied with the Court's Order in this regard, however, on October 3, 1973, prior to the hearing, the defendants filed a notice of appeal. Although no appealable order had been entered by this Court in the case as of that date, the Court was of the opinion that its Order of September 6, 1973, did involve controlling questions of law as to which there were substantial grounds for differences of opinion and that an immediate appeal from the order might materially advance the ultimate termination of the lawsuit. Having determined that the Order met the guidelines set forth in 28 U.S.C. §1292(b) for certification of an otherwise non-appealable Order, this Court entered an Order, sua sponte, on October 24, 1973 certifying the appeal as of October 2, 1973 nunc pro tunc. In addition, the certification order provided for a stay of proceedings pending

the appeal and ordered that any and all interim relief previously granted by this Court would remain in effect. That appeal is still pending.

On June 21, 1974, plaintiffs filed a motion in this Court to hold defendants and other individuals, including Henry B. Fischer who is counsel for the defendants and Law Director of the City of East Cleveland, in contempt for violation of this Court's interim orders and for violation of this Court's Order of September 6, 1973. The Court's interim orders, which were injunctive in nature, limited the number of persons whom the City of East Cleveland should appoint to fill vacancies in the Police Department. This Court clearly ordered that such interim relief would remain in effect pending the appeal in this case. However, before proceeding to a consideration of the plaintiffs' allegations in this regard, the Court will first consider plaintiffs' allegations regarding defendants' violation of the September 6th Order.

Plaintiffs have apprised the Court that the City of East Cleveland has scheduled a police examination for June 29, 1974. The defendants and Henry Fischer have filed a response to the plaintiffs' motion to hold them in contempt in which they confirm this fact. The plaintiffs assert that the distribution of applications and notices for the examination and the City's current testing program are all the product of a newly developed program which defendants have implemented without Court permission or approval.

The defendants do not deny that they have instituted a new program, and in fact, the defendants state that the program now in effect is an implementation of the proposed Program Plan submitted by them to this Court pursuant to the Court's September 6th Order. The plaintiffs contend that the testing program violates certain injunctive relief granted in that Order. On the other hand, the defendants argue that there has been no order issued by the Court restraining them from implementing a new program and that this current plan can only be challenged by the plaintiffs in a separate lawsuit.

In light of the parties' contentions, this Court feels that it is necessary to clarify the Court's Order of September 6th. Although the Court clearly indicated its intention to grant certain injunctive relief consistent with its findings of fact and the declaratory relief afforded such injunctive relief was not granted in the Order. The Court stated that it would enjoin certain activities in an effort to apprise the parties of the direction of the Court so that they might take such intended court action into account in drawing up their respective proposals for an acceptable testing and hiring program. No relief other than declaratory relief was granted. As stated above, the Court was aware of its broad discretion in fashioning appropriate relief and deferred the issuance of injunctive or affirmative relief until such time as the parties had submitted their proposals and the Court could fashion, with their

participation, final relief consistent with its findings. There was, therefore, no specific Order barring the defendants' unilateral development and implementation of a new hiring program.

Nevertheless, the Court rejects defendants contention that plaintiffs may not challenge their actions in so doing in this lawsuit. The only matter remaining for this Court's determination after entry of the September 6th Order was the matter of relief to be afforded the plaintiffs. Certainly defendants cannot argue that had no appeal been taken, they could have proceeded without leave or approval of this Court to implement the proposed plan which they submitted to this Court on September 21, 1973 pursuant to Court Order. The plaintiffs, having been successful in the prosecution of certain of their claims, would have been entitled to challenge that proposal at a hearing to determine the appropriate final relief. Merely because the defendants appealed this Court's Order, they cannot now assert, prior to the determination of the Court of Appeals, that the plaintiffs no longer claim a valid right to participate in the fashioning of appropriate relief in this suit or that this Court is automatically divested of the authority to determine what final relief it will order.

The Court is sympathetic with the difficulties which a municipality faces in the management of a police department. In addition the Court realizes that defendants herein have sought to

expedite their appeal, which has been delayed due, to a large extent, to the Sixth Circuit Amended Local Rule 12(d) 1/, which has caused a slow-down in completion of the transcript. However, when this Court issued its order certifying defendants' appeal and staying the proceedings herein, the Court intended that the stay would apply to the further fashioning of relief. The Court did not contemplate that the defendants would construe that stay order as divesting the Court of its supervision and ultimate determination on the relief to be afforded in this action.

A stay of matters in an appeal taken pursuant to §1292(b) is rarely appropriate under any circumstances. Fisons Limited v. United States, 458 F. 2d 1241, 1248 (7th Cir. 1972), cert. denied 405 U. S. 1041 (1972). The Court, therefore, in light of the circumstances which have developed, orders that the stay of proceedings in this Court previously entered herein is hereby vacated.

The stay having been lifted, this Court will proceed to determine the issue of final relief

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1/ This Amended Rule, entered June 11, 1973, provides that the Court Reporters must give procedence to preparation of transcripts in criminal appeals.

which was before it in September of 1973. The defendants and all agents and employees of the City of East Cleveland, or other persons having knowledge of this Order are, therefore, hereby enjoined from further implementation of that proposed plan which was submitted to but not approved by this Court. The aforementioned persons are further enjoined from distributing applications for or administering the current testing program on June 29, 1974, which program was developed without Court permission or supervision.

The motion to find the defendants in contempt is overruled at this time. However, the Court has scheduled a hearing on Monday, July 1, 1974 at 3:00 p.m. for the purpose of considering plaintiffs' motion to hold defendants in contempt of the interim injunctive relief and to proceed with the fashioning of final relief in this lawsuit.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: 6/26/74

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed July 3, 1974)

ELIZABETH SMITH, et al.,

Plaintiffs,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

Pursuant to the hearing held on July 1, 1974 in the above-captioned action, the Court orders the following:

1. Upon motion of the plaintiffs, their motion to hold defendants Troyan, Gowen, Ritchie and Barrett and Henry B. Fischer in contempt is dismissed;

2. The motion of defendants for stay of execution of this Court's judgment, made

pursuant to Rule 62 of the Federal Rules of Civil Procedure, is overruled;

3. No final relief having been granted by this Court's Order of September 6, 1973 nor judgment entered in this case, the Court will proceed, in accordance with the provisions of 28 U.S.C. §1292(b), to fashion such final relief and enter final judgment;

4. The parties shall proceed with the schedule set forth at the hearing for filing and exchanging materials and to meet to discuss the police recruiting and testing program developed by East Cleveland;

5. An evidentiary hearing is scheduled for July 11, 1974 at 10:00 a.m., at which time the defendants shall present expert testimony with regard to their proposed plan and the development of their current program pursuant thereto. Plaintiffs shall have an opportunity to cross-examine defendants' witnesses at that hearing, however, such cross-examination will not prejudice plaintiffs' rights to recall defendants' experts for further cross-examination at a later time. Should plaintiffs deem discovery to be necessary after defendants' presentation, the Court will consider the appropriate motion(s) at that time.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: 7/3/74

B-19
Order of the District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed July 18, 1974)

ELIZABETH SMITH, et al.,

Plaintiffs,

v.

THE CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

In accordance with this Court's orders of June 26, 1974 and July 3, 1974, a hearing was scheduled in the above-captioned action for the purpose of shaping final injunctive and affirmative relief consistent with this Court's findings as set forth in a memorandum opinion and order of September 6, 1973 after a trial on the merits. Prior to the hearing, defendants filed several motions with this Court, including a motion to terminate the proceedings to fashion relief on the ground that this Court lacks jurisdiction to proceed in this regard.

B-20
Order of the District Court

At the hearing on July 15, 1974, the Court permitted the parties to present arguments with regard to the present scope of this Court's jurisdiction in light of the appeal taken by defendants to the United States Court of Appeals for the Sixth Circuit and in light of an Order of that Court dated April 4, 1974 of which this Court was made aware through defendants' motion to terminate the proceedings herein. On the basis of the rather unusual developments in this matter since this Court issued its memorandum opinion and order on September 6, 1973, this Court determines that it would be unseemly to proceed with further consideration or to take further action relative to the shaping of final relief at this time. Therefore, for the reasons stated on the record of the July 15, 1974 hearing, which record is incorporated herein and set forth in pertinent part below, this Court will grant defendants' motion to terminate the relief proceedings at this time on the ground that this Court lacks jurisdiction to so proceed because of the April 4, 1974 Order of the Sixth Circuit Court of Appeals, unless and until such time as the plaintiffs may obtain a determination from that Court to the contrary.

At the hearing on July 15th after the parties had presented their arguments with regard to the jurisdiction of this Court, the Court made the following oral ruling:

> THE COURT: All right. Although it may appear from the statements of counsel and from these proceedings that there is some mystery as to what has transpired and the

effect of any findings or order of this Court, I don't believe there is any mystery, nor does anyone labor under a misapprehension as to the findings of this Court or the intent of this Court in its order of September, 1973.

The Court made its specific findings that defendants' enforcement of the minimum height and weight requirements for police officer applicants in East Cleveland unlawfully discriminates against women.

The Court also made a finding that defendants' use of the AGCT test to screen applicants unlawfully discriminates against blacks.

And the Court further found that defendants' application of the veteran's preference prior to determining whether the candidate is qualified violates Ohio law.

The Court did indicate that it would enjoin the further use of the AGCT test which unlawfully discriminates against blacks and that it would enjoin the further enforcement of the minimum height and weight requirements.

The Court wanted to give both sides a full and complete opportunity to actively participate in an adversary manner in the

fashioning of the final relief and, therefore, following the Court's formal findings on the merits, the Court directed that the parties submit proposed plans for the implementation of the Court's rulings within 20 days of the order issuing, and the Court did at that time schedule the case for hearing on final relief on October 12th, 1973.

The Court desired to receive the plans of the respective parties and have a full and complete evidentiary hearing and arguments of counsel so that it could effectively fashion final relief in issuing those necessary orders to cause, in effect, an implementation of the final relief.

Prior to that hearing on final relief, an appeal was taken by the defendants, challenged by the plaintiffs, and the Court of Appeals issued its ruling that to the extent that the order of September 6, 1973 is interlocutory or granting injunctive relief, that the appeal would be recognized, and it denied the order to dismiss of the plaintiffs, but without prejudice to raise such issues to the panel to whom the matter is assigned for decision on the merits.

No separate judgment was issued in this case, nor was a portion of this case or any part of this case certified for appeal.

Order of the District Court

Although it is not for this Court to make that determination because it would go beyond the realm of propriety, it clearly appears that with the absence of a certification of part of the case for appeal, that an appeal to the order is not properly taken, and it would appear that the present status of this case does not materially advance the ultimate determination of this litigation in that the City of East Cleveland is desirous of qualifying additional police officers.

If my recollection serves me correctly, there was a certification issued on a nunc pro tunc basis in order to satisfy the time requirements, and the Court did certify, but it was certified under 1292 contemplating that it would materially advance the ultimate determination of the litigation.

However, at such time as the City of East Cleveland proceeded to conduct another examination prior to fashioning of final relief by this Court, the Court made a determination that the appeal would no longer materially advance the ultimate determination of the appeal and then scheduled this matter for an evidentiary hearing on the final relief. 1/

1/ See this Court's Order of June 26, 1974, which vacated the stay previously imposed under 28 U.S.C. §1292(b).

Order of the District Court

However, my view is this. The Court of Appeals has recognized the appeal, 2/ and although the Court feels that there is authority based on the citations presented by the plaintiffs, Supreme Court citations relative to proceeding with other issues when there is an appeal on an interlocutory order, my view is that it would appear somewhat unseemly for this Court to proceed with further consideration of this case in view of the pendency of an appeal.

2/ The Court of Appeals in its Order of April 4, 1974 ruled that "to the extent that the Memorandum Opinion and Order issued by the District Court on September 6, 1973 is not a final judgment, but is an interlocutory order granting injunctive relief, the same is appealable under 28 U.S.C. §1292(a)(1)." The September 6, 1973 Memorandum Opinion and Order did continue the interim injunctive relief granted prior to the conclusion of the trial on the merits. However, it is not clear to this Court whether the Court of Appeals Order of April 4, 1974 refers to the interim relief only as the subject of appeal under 28 U.S.C. §1292(a)(1), or whether the Court has interpreted this Court's statement of intent to issue other final injunctive relief based on its September 6th findings as an interlocutory decree from which an appeal would be proper under 28 U.S.C. §1292(a)(1).

For that reason, it is my view that I shall take no further action in this case relative to final relief notwithstanding the city contemplating to conduct an examination for qualifying of additional police officers. Until such time as the Court of Appeals clarifies the status of this matter so that I may fully comprehend the parameters of this Court's jurisdiction, if any, pending the appeal, I shall take no further action in this matter.

If the plaintiffs wish to apply for reconsideration of their previous motion to dismiss, or if a panel has been designated for the consideration of the case on the merits and you wish to submit the matter to that panel for consideration, or if the plaintiffs wish to file a mandamus action seeking to direct this Court to proceed with final hearing on any other alternative, certainly you may and should proceed in that fashion if it will aid in the clarification of this Court's authority to proceed with the fashion if it will aid in the clarification of this Court's authority to proceed with the fashioning [sic] of final relief.

The Court will take no further action. [Tr. pp. 25-30].

It should also be noted with regard to this Court's statement on the record that the parties should have been under no misapprehension

as to the findings of this Court in its September 6, 1973 order, that on October 2, 1973 (one day before the defendants appealed that order) this Court issued an order directing the parties to submit certain proposed programs for relief and setting forth a date on which a hearing was to have been held to consider such proposals. That October 2nd order specifically stated that the Court had deferred issuing any injunctive relief in its September 6th order. It was the Court's intention to proceed with the fashioning of final relief in an expeditious manner and terminate proceedings in this Court. The Court, therefore, did not enter a separate document or judgment relative to its findings on September 6th. It would appear that the entry of such a document is a prerequisite to the taking of an appeal pursuant to 28 U.S.C. §1292(a)(1). Columbus Coated Fabrics v. The Industrial Commission of Ohio, ____ F. 2d ____ (6th Cir. May 29, 1974).

The Court, prior to learning of the April 4, 1974 Order of the Court of Appeals, had proceeded in this action on the assumption that the September 6, 1973 Order was a non-appealable order. See Bradley v. Milliken, 468 F. 2d 902 (6th Cir. 1972), cert. denied, 93 S. Ct. 45 and Bradley v. Milliken, 484 F. 2d 215, 220 (6th Cir. 1973). 3/

3/ Although the Bradley case was a school desegregation case, this Court took a similar approach to the instant case since the Sixth Circuit has repeatedly held that a district court has broad

However, for the reasons stated above, this Court will defer taking further action toward the fashioning of final relief at this time. The interim relief previously granted limiting the number of vacancies which may be filled shall remain in effect.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: 7/18/74

Footnote 3 continued

discretion in fashioning relief in employment discrimination cases and that the judge's discretion will only be reversed in the shaping of that relief if there is an abuse of that discretion. See Thorton v. East Texas Motor Freight, _____ F. 2d _____ (6th Cir. May 21, 1974).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-2226

(Filed Sept. 12, 1974)

ELIZABETH A. SMITH, et al.,

Plaintiff-Appellees,

v.

ROBERT TROYAN, et al.,

Defendant-Appellants.

Before: WEICK, EDWARDS, and ENGEL,
Circuit Judges

Plaintiffs-appellees having filed herein on August 13, 1974, their motion to reconsider the order heretofore entered in this appeal on April 4, 1974 denying their motion to dismiss, on consideration,

It is Ordered that said motion to reconsider be and the same is hereby DENIED.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
Clerk

CERTIFICATE OF SERVICE

Three copies of Plaintiffs' Supplemental Brief and Appendix to the Petition for a Writ of Certiorari have been forwarded, by United States mail, first class, postage prepaid, to Charles T. Riehl, Esq., 1215 Terminal Tower, Cleveland, Ohio 44113, and Henry B. Fischer, Esq., Williamson Building, Cleveland, Ohio 44114, Attorneys for Defendants-Respondents, this 28th day of April, 1976.

Charles E. Grossier
Attorney for Petitioners

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-734

ELIZABETH A. SMITH, ET AL.,

Petitioners

vs.

ROBERT TROYAN, ET AL.,

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENTS' REPLY BRIEF TO PETITIONERS' SUPPLEMENTAL BRIEF

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CASES

TREATISE

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-734

ELIZABETH A. SMITH, ET AL.,

Petitioners

vs.

ROBERT TROYAN, ET AL.,

Respondents

RESPONDENTS' REPLY BRIEF TO
PETITIONERS' SUPPLEMENTAL BRIEF

I. PRELIMINARY STATEMENT

On April 22, 1976, pursuant to Rule 24(5) of the Rules of this Court, the petitioner filed a Supplementary Brief and Appendix claiming that this Court's decision involving Liberty Mutual Insurance Company v. Wetzel, _____ U.S. _____, 44 U.S. L.W. 4350 (No.74-1245, March 23, 1976) should serve as additional grounds for the granting of a writ of certiorari and the reversal of the Sixth Circuit Court of Appeals decision in the instant matter. Since we believe

Liberty Mutual dealt solely with the issue of the "finality" of the District Court's decision pursuant to 28 U.S.C. §1291, it is submitted that the decision has no application to the instant matter. The Court of Appeals in the instant matter determined it obtained jurisdiction to review the District Court's order pursuant to 28 U.S.C.§1292(a)(1) which allows review of interlocutory orders granting injunctive relief. A copy of 28 U.S.C.§1292(a)(1) is attached hereto as Exhibit "A".

II FACTS

A brief review of the procedural history of the instant matter will reveal why the Court of Appeals correctly held that it obtained jurisdiction. The complaint in the District Court was filed on March 23, 1973. The District Court set the case to be tried on April 4, 1973, a total of twelve days from the time the complaint was filed. A continuance was obtained for the date of the trial until May 15, 1973. However, the continuance was conditioned upon the Court's order that the respondents "shall not fill two (2) of its openings for patrolmen pending the hearing on the merits and the Court's decision thereon." See District Court's order of April 4, 1973, attached hereto as Exhibit "B". Further, the

continuance was conditioned upon the understanding that the respondents would allow the petitioner to take the disputed police candidate examination.

Commencing May 15, 1973, a thirteen-day trial was conducted after which the matter was submitted to the Court on various briefs and arguments of counsel. While the court was considering the matter, on August 24, 1973, the District Court issued a further order in which it acknowledged that certain further vacancies had opened in the East Cleveland Police Department. Pending final disposition in the matter, therefore, the District Court required the City of East Cleveland to keep open four vacancies in its Police Department. See District Court's order of August 24, 1973 attached hereto as Exhibit "C". The East Cleveland Police Department has an authorized strength of seventy-one positions; therefore, the four vacancies required to be kept open amounted to six percent of the authorized strength of the police force.

On September 6, 1973, the District Court issued a document entitled "Memorandum Opinion and Order," which is contested herein. In this document, the Court clearly continued in effect its injunction of August 24, 1973 concerning open vacancies in the department. Further,

in a separately denominated section entitled "Relief", the District Court stated:

"VII RELIEF

"On the basis of the reasoning above the Court rules that:

1. Defendants' enforcement of the minimum height and weight requirements for police officer applicants in East Cleveland unlawfully discriminates against women;

2. Defendants' use of the AGCT to screen applicants unlawfully discriminates against blacks; and

3. Defendants' application of the veterans' preference prior to determining whether the candidate is qualified violates Ohio law.

"In determining the proper relief, the Court must also consider any history of discrimination. With respect to the discrimination, the evidence indicates that defendants have already made positive efforts to erase the effects of past discrimination through recruitment. Therefore, the Court is not inclined to

order affirmative relief with respect to past discrimination. However, it will enjoin the further use of the AGCT examination which unlawfully discriminates against black applicants.

"With respect to sex discrimination, the Court is convinced that there has been past discrimination. However, because the Court does not know the numbers of those women who would have applied but for the height and weight requirements, it is inclined to order only limited affirmative relief for the past discrimination. It will, however, enjoin further enforcement of the minimum height and weight requirements.

"The Court is aware that there is some leeway in fashioning relief. It therefore requests the defendants to file a proposed plan for implementation of the Court's rulings within twenty days of the date of this Order. The plaintiffs are ordered to respond to the plan within ten days thereafter. A hearing to discuss final relief will be held on October 12, 1973. Pending such a hearing the interim relief heretofore granted

will remain in effect.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States
District Judge

Dated: September 6, 1973."

The respondents appealed from this Order on October 3, 1973 and the petitioner cross-appealed from this Order on October 17, 1973. After thorough briefing, on April 4, 1974, the Court of Appeals determined that it had jurisdiction over the appeal.

In June of 1974, the eligibility list for appointments to the East Cleveland Police Department expired. Since at that time there were six vacancies on the Police Department (or approximately 9 percent of authorized strength), the respondents scheduled a new examination based on new procedures for June 29, 1974.

The petitioner responded to the scheduling of the test by filing in the District Court a "Motion To Hold in Contempt". One of the petitioner's grounds for the contempt motion was that the newly scheduled test would be in violation of the District Court's September 6, 1973 injunction. As the petitioner stated in her brief:

"On September 6, 1973, this court

enjoined:

A. The City of East Cleveland from using the Army General Classification Test to screen applicants for police positions; and

B. The enforcement by East Cleveland of minimum height and weight requirements for police officer applicants in East Cleveland and found with respect to sex discrimination, there was past discrimination on the part of East Cleveland . . . .

"Despite the orders of the Court, the defendants are proceeding to administer written and physical examinations on June 29, 1974, absent any stay or consultation with the Court, even though the Court has indicated that some relief will be granted and has not ruled upon the plans for relief submitted by both parties . . . ."

In response to the petitioner's motion for contempt, the District Court enjoined the giving of the new examination, and set the matter down for hearing.

The respondents filed a motion to terminate the hearing on the grounds that jurisdiction of this matter rested in the Court of Appeals. At a hearing on July 15, 1974, the District Court

orally ruled, and again by written opinion on July 18, ruled inter alia that it lacked jurisdiction since this matter was before the Court of Appeals.

On August 9, 1974, the petitioner moved the Court of Appeals to reconsider its April 4, 1974 Order finding of jurisdiction, which motion was denied on September 12, 1974.

III. THE DISTRICT COURT'S SEPTEMBER 6 ORDER IS AN APPEALABLE INTERLOCUTORY INJUNCTION

The petitioner comes before this Court and claims that the District Court's September 6th Order is not an injunction because the Court merely stated that "It will enjoin the further use of the AGCT Examination which unlawfully discriminates against black applicants . . ." and ". . . It will, however, enjoin further enforcement of the minimum height and weight requirements." According to the petitioner, the foregoing language merely indicates an expression of intent on the part of the District Court to issue the injunction at some indefinite time in the future.

On June 12, 1974, however, the petitioner clearly thought that the respondents were presently and immediately enjoined by the September 6th Order. Accordingly, the petitioner

filed a motion to hold the respondents in contempt on the grounds that the respondents would violate the Court's September 6, 1973 injunction by giving their proposed new test. Further, the petitioner must concede that the September 6th Order required the respondents to hold open four vacancies on their police force.

It is the respondents' position that the plain language of the District Court's September 6th Order is injunctive in nature and was properly appealable pursuant to 28 U.S.C.§1292(a)(1).

In determining whether an order is injunctive in nature, and hence appealable, courts will look not to the terminology of the order, but rather to the substantial effect of the order made. McCoy v. Louisiana State Board of Education, 345 F. 2d 720 (5th Cir. 1965); Hotel & Restaurant Employees v. Del Valle, 328 F. 2d 885 (1st Cir.1964). See also United States v. Cities Service Co.,410 F. 2d 662 (1st Cir.1969). This Court as well as lower courts have recognized that it is the substance of the rights affected rather than the form of the order which determines appealability. Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942); Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935); General Electric Co. v. Marvel Rare Metals Co.,287 U.S. 430 (1932); Ring v. Spina, 166 F. 2d 546 (2nd Cir.1948). The manifest pur-

pose of the statute allowing appeals from interlocutory injunctions is to enable the litigant to seek proper review in an appellate court from an order or decree which in most instances is effective upon its rendition and is drastic and far-reaching in effect. See Barron & Holtzoff, Federal Practice and Procedure, Section 1440.

The injunctive order of September 6th was made after a full trial on the merits and a finding of the constitutional invalidity of the AGCT Test and the height and weight requirements. These findings, coupled with the District Court's declaration of injunction of these two testing procedures and order mandating vacancies on the police force, had the effect of enjoining the City's reliance upon these two testing methods in determining eligible applicants for the Police Department.

Obviously, the respondents would have been foolish to test applicants upon a basis which the Court had previously declared to be illegal prior to the proper review of the District Court's decision. Even the respondents' attempts in the summer of 1974 to use a new basis of testing were greeted by the petitioner's Motion for Contempt. The status of any appointees made pursuant to such testing would be in serious jeopardy. Thus, the purpose of Section 1292(a)(1) was served by a prompt review of the legality of

the District Court's September 6 Order. The District Court agreed that its decision should be reviewed by the Court of Appeals since it ordered certification pursuant to Section 1292(B) on October 24, 1973.

The District Court in its June 26, 1974 explanation of its September 6, 1973 Order attempted to modify the injunctive nature of the September 6 Order by stating that it only intended to enjoin certain activities in the future. Of course, the District Court's June 26, 1974 Opinion was issued with full knowledge of the Court of Appeals April 4, 1974 ruling which had found jurisdiction. As an initial matter, the District Court was clearly incorrect in stating that no relief other than declaratory relief was granted, since the District Court specifically continued the injunction against the City to keep open four vacancies on its 71-officer police department. Further, the District Court's interpretation of its own order takes the technical terminology approach, rather than the substantial effect approach, critized by the Fifth and First Circuits. McCoy, supra, Hotel & Restaurant Employees, supra. The substance of the District Court's orders was to enjoin the respondents from utilizing these two testing procedures, and this was sufficient to give the Court of Appeals jurisdiction to review the validity of the District Court's order declaring invalid these two testing procedures.

The petitioner's reliance on the Liberty Mutual case is misplaced. Liberty Mutual dealt solely with the issue of whether a District Court's granting of partial summary judgment only as to the issue of liability in a declaratory judgment action satisfied the tests for "finality" to allow an appeal pursuant to 28 U.S.C.§1291. As this Court carefully pointed out, there was no interlocutory injunctive order issued in the Liberty Mutual case. As we have pointed out in this Brief, and as the Court of Appeals found in the instant matter, the District Court's opinion was an interlocutory order granting injunctive relief which was properly appealable under 28 U.S.C. §1292(a)(1).

IV. CONCLUSION

For all the foregoing reasons, respondents respectfully request the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three (3) copies of the Respondents' Reply Brief were deposited in the regular U.S. Mail, postage pre-paid, on the 14 day of May, 1976, addressed to Jane M. Picker, Esq., 620 Keith Building, 1621 Euclid Avenue, Cleveland, Ohio, 44115, attorneys for the plaintiff-petitioner.

Attorney for
Respondents

A-1

28 U.S.C. §1292

(a) The courts of appeals have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the Districk Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

EXHIBIT "A"

Filed
April 4,1973

A-2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ELIZABETH A. SMITH, Plaintiff	)	NO. C 73-299
v.	)	O R D E R
CITY OF EAST CLEVELAND, et al., Defendants	)	

LAMBROS, DISTRICT JUDGE

This case was set for trial for April 4, 1973. The defendant, City of East Cleveland, has now moved for a continuance.

After due consideration, the motion will be granted upon the following condition. The defendant, City of East Cleveland, shall not fill two of its openings for patrolmen pending the hearing on the merits and the Court's

EXHIBIT B

decision thereon. The trial on the merits will be held on May 15, 1973 at 10:00 A.M.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
United States
District Judge

DATED: 4/4/73

Filed:
August 24,1973

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ELIZABETH A. SMITH Plaintiff v. CITY OF EAST CLEVELAND, et al., Defendants	)	CASE NO. C 73-299 O R D E R

LAMBROS, District Judge

This is a class action on behalf of all women and blacks who have been denied employment in the East Cleveland Police Department by restrictions which they claim are in violation of 42 U.S. C. §1983 and the Fourteenth Amendment. The matter presently before the Court is defendants' motion for a modification of the interim relief previously ordered by the Court.

On the basis of argument at trial

EXHIBIT "C"

the Court previously permitted defendants to fill four of seven vacancies in the Police Department but required defendants to keep three positions open pending final outcome of this suit. Defendants now represent by affidavit, that an additional two positions are open and that they feel it necessary to fill these vacancies as well as the three originally left open by the Court.

This case having been tried and the Court having taken the case under advisement for ruling, the Court rules that its previous ruling regarding hiring pending the suit be continued in effect and that defendants should keep one of the two new vacancies open pending final disposition. The Court will, however, permit the hiring to fill one vacancy.

Defendants' motion is therefore sustained in part and overruled in part.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
United States District Judge

DATED: Aug. 24, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-734

ELIZABETH A. SMITH, et al.,

Petitioner,

v.

ROBERT TROYAN, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-734

ELIZABETH A. SMITH, et al.,

Petitioner,

v.

ROBERT TROYAN, et al.,

Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order vacating its denial of the Petition For A Writ Of Certiorari entered on June 14, 1976, and granting the petition. This petition for a rehearing is founded upon the recent decision of this Court in Washington v. Davis, ___ U. S. ___, 44 L.W. 4789 (No. 74-1492) (June 7, 1976).

The instant case presents the question, inter alia, whether the enforcement of an ordinance which requires applicants for the position of municipal police officer to meet a minimum height requirement is sexually discriminatory and in violation of the Equal Protection Clause of the Fourteenth Amendment. 1/ Washington v. Davis now makes clear that, in the context of such a challenge, proof of discriminatory purpose is necessary in order to make out an equal protection violation. Washington v. Davis, ___ U. S. ___, 44 L.W. at 4794. This purpose to discriminate may be proven in a variety of ways: by demonstrating the intentional systematic exclusion of members of a protected class, or by showing an unequal application of

---

1/ In her Petition For A Writ Of Certiorari, filed November 18, 1975, Petitioner presented three separate questions for review: two relating to her allegation of sex discrimination and one relating to her allegation of race discrimination. Petitioner does not now seek review of that portion of the decision of the United States Court of Appeals for the Sixth Circuit relating to the alleged racially discriminatory nature of the written entrance examination administered by the Respondents. However, because the sex discrimination aspect of this case has a factually different foundation than the race discrimination claim, Petitioner seeks this rehearing.

the law. 44 L.W. at 4792. "Frequently the most probative evidence of intent will be ; objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." 44 L.W. at 4800. (Stevens, J. concurring). Although disproportionate impact is not irrelevant, a law is not unconstitutional solely because it has such an impact. Occasionally the disproportion may be so dramatic that it cannot be explained on non-discriminatory grounds. However, the general rule, absent exceptional circumstances, is that disproportionate impact standing alone is not sufficient to make out a case of unconstitutionality. 44 L.W. at 4792-4793.

Because Petitioner believes that the United States Court of Appeals for the Sixth Circuit utilized a standard contrary to that mandated by Washington v. Davis in judging the constitutionality of the challenged height requirement, Petitioner now seeks full review of that decision. Alternatively, Petitioner seeks an order vacating the decision of the Court of Appeals and remanding this case to the District Court for reconsideration in light of Washington v. Davis. 2/ Cf. Place v.

2/ In its present stance this case faces further proceedings in the District Court. The District Court, after trial, found three separate violations of the law: (1) The unconstitutionality of the height and weight requirements; (2) The unconstitutionality of the written test; and (3) The unlawful application of the Ohio veteran's

Weinberger, ____ U.S. ____, 44 L.W. 3718 (No. 74-116) (June 14, 1976).

In its Order of September 6, 1973, 3/ the District Court held that Defendants' enforcement of the minimum height and weight requirements for police officer applicants unlawfully discriminated against the Petitioner and her class because of their sex. The Court concluded that the requirements "were maintained and enforced by the defendants as a part of a process to hire only males as police officers with the effect and intent

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(Footnote 2 continued)

preference statute. (A-56-57). However, before any comprehensive plan for relief could be fashioned by the court, the Respondents appealed as to some of these findings. The Respondents succeeded in reversing only two of the court's conclusions. The District Court's determinations as to the application of the veteran's preference and the unconstitutionality of the weight requirement remain undisturbed. Consequently, the District Court now must fashion appropriate relief to effectuate both its earlier decision and that of the court of appeals.

3/ The District Court Order appears in the Appendix to the Petition For A Writ Of Certiorari at pages A-1 through A-58. The decision of the Court of Appeals appears at pages A-59 through A-70 of this same Appendix.

to exclude nearly all women." (A-31) (emphasis added). The Court reached this conclusion only after having found numerous independent instances of sexually discriminatory intent. During the entire history of the Police Department, no women had been certified for hiring or hired as police officers. (A-11). During the 1950's, when the height and weight requirements were adopted, there were no positions available for women. (A-10). The requirements represented a figure which was considered reasonable for male applicants and, had the Defendants been seeking women, they would have modified the height and weight requirements accordingly. (A-10-11). After examining the statistical effect of the height and weight requirements, the Court found that together they excluded ninety-nine percent (99%) of the adult female population from employment as police officers, while permitting a majority of the adult male population to remain eligible for such employment. (A-9-10). When Petitioner initially inquired about the position of police officer, she was discouraged from applying and told that the Defendants were not seeking women. (A-11). However, at the same time that Petitioner was being turned away because of her failure to meet the height requirement, two males who also failed to meet the requirement were permitted to take the examination. (A-11).

These findings, when viewed together with the past and present policy of the Defendants toward the hiring of women, compelled the Court to conclude that the height and weight re-

quirements were enforced and maintained as a contrivance to guarantee an all male work force. (A-31). Cf. Wright v. Rockefeller, 376 U.S. 52 (1964); Yick Wo v. Hopkins, 118 U. S. 356 (1886).

When the Court of Appeals for the Sixth Circuit reviewed the District Court's opinion, it failed to consider these specific findings of intent which supported the trial court's opinion. [4/] Purporting to draw guidance from this Court's opinion in Geduldig v. Aiello, 417 U. S. 484 (1974), the appellate court concluded that based solely upon the evidence of disparate impact, the height requirement did not create a gender-related classification.

However, at no time did the Court discuss whether the specific findings of intentional discrimination were sufficient to establish the pretext referred to in footnote 20 of Geduldig v. Aiello, 417 U. S. at 496-497. Lacking the benefit

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4/ Although the Court of Appeals never concluded that any of the District Court's findings of fact were clearly erroneous, Rule 52(a), Federal Rules of Civil Procedure, it did appear to ignore certain of them and confuse others. Compare A-63, n. 5, with the District Court's finding that two men were permitted to take the test in spite of the fact that they failed to meet the height requirement. (A-11).

of this Court's decision in Washington v. Davis, supra, the Court of Appeals never analyzed Petitioner's evidence in light of this recent pronouncement. 5/ Petitioner submits that the Court of Appeals erred in applying the test of equal protection by failing to consider the effect that the District Court's specific findings of intent have on its consideration of the Petitioner's claim.

CONCLUSION

For the above reasons, as well as those contained in the Petition for a Writ of Certiorari, Petitioner prays that this Court direct the Respondents to reply to this Petition for Rehearing, and that the Court thereafter grant

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5/ Petitioner has been informed that on June 28, 1976, a three-judge panel of the Middle District of Alabama declared, in a per curiam opinion, that the Alabama statutory height and weight requirements for employment as a state trooper were sexually discriminatory and in contravention of the Fourteenth Amendment. After applying the Washington v. Davis standard to the facts before it, the court reached a conclusion contrary to that of the Sixth Circuit. Mieth v. Dothard, Civil Action No. 75-433-N (M.D. Alabama, June 28, 1976).

rehearing of the Order of denial, vacate that Order, grant the Petition, and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As Counsel for Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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Counsel for Petitioner

CERTIFICATE OF SERVICE

Three copies of the Petition for Rehearing have been mailed this 6th day of July, 1976, to Charles T. Riehl, Esq., 1215 Terminal Tower, Cleveland, Ohio 44113, and Henry B. Fischer, Esq., Williamson Building, Cleveland, Ohio 44114, Attorneys for Defendants-Respondents.

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